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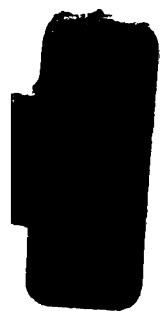
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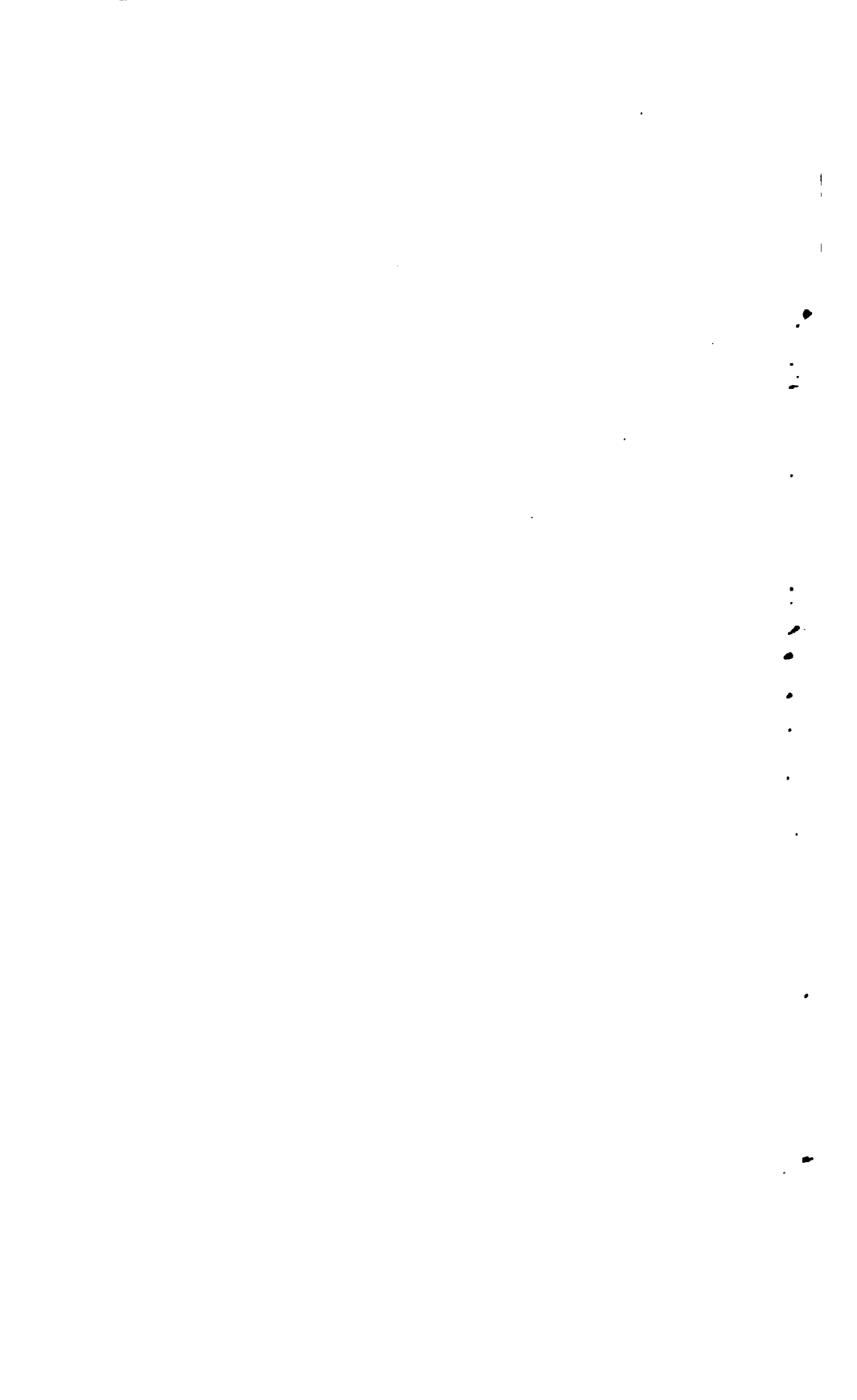
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THE
REVISED REPORTS

BRING
A REPUBLICATION OF SUCH CASES
IN THE
ENGLISH COURTS OF COMMON LAW AND EQUITY,
FROM THE YEAR 1785,
AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY
SIR FREDERICK POLLOCK, BART., D.C.L., LL.D.,
OF LINCOLN'S INN,
ASSISTED BY
O. A. SAUNDERS, J. G. PEASE, AND ARTHUR B. CANE,
EQUITY CASES). (COMMON LAW CASES).
ALL OF THE INNER TEMPLE.

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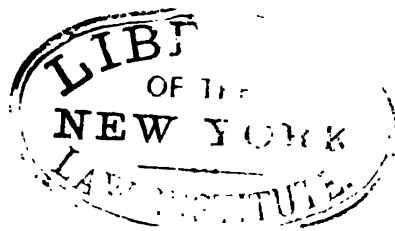
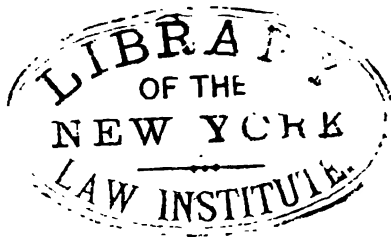


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PREFACE TO VOL. LXXXII.

FOR some obscure reason the authorized reporters appear to have been particularly careless towards the middle of the nineteenth century in attending to Chancery appeals. We find some of these reported only in serial or competing reports (pp. 208, 224, 240 of this volume), and others barely mentioned without a report (pp. 69, 98, and elsewhere). The profession must have been long-suffering in those days. It is rather amusing to find Mr. W. M. James, afterwards, as Vice-Chancellor and Lord Justice, one of our most eminent equity judges, in the character of a successful defendant in a suit for specific performance: *Lucas v. James*, p. 147. The Free Church controversy in Scotland, which now bulks large in the reports of the House of Lords, had incidental effects in England at a much earlier stage: *Att.-Gen. v. Murdoch*, p. 172.

In *Jones v. Broadhurst*, p. 351, the question whether and how far payment received from a stranger is satisfaction of a debt is discussed with much learning. It cannot be said to be perfectly settled in England.

There are several important cases on negligence and allied topics. *Barnes v. Ward*, p. 375, is a leading decision on the duty of occupiers adjacent to high roads not to make their land a trap for persons lawfully passing on the road. In *Rigby v. Hewitt* and *Greenland v. Chaplin* (pp. 652, 655, 659) we have, it is believed, the first clear statement of the rule as to consequential damage which is now generally accepted, namely "that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard

against that which no reasonable man would expect to occur." The doctrine of "common employment"—perhaps better called "the fellow-servant rule" by American lawyers—was considered in *Hutchinson v. York, Newcastle and Berwick Ry. Co.*, p. 697, and definitely put on the only plausible ground, that of an implied agreement by the servant to take all ordinary risks of the employment, including negligence of his fellow-servants. But the soundness of the argument has not appeared so obvious to the present generation as it did to the Court of Exchequer, and to American Courts of high authority, half a century ago.

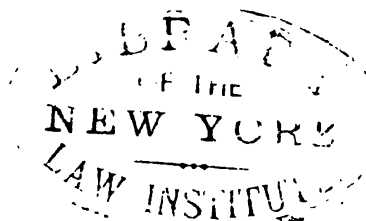
In *Millward v. Littlewood*, pp. 871, 874, following *Wild v. Harris*, 78 R. R. 899, Parke, B. expressed the true ground of the decision, which is obscurely indicated, if at all, in the earlier judgment of the Court of Common Pleas. "The promise by the defendant to marry the plaintiff implies, on his part, that he is then capable of marrying, and"—being in fact already married, without the plaintiff's knowledge—"he has broken that promise at the time of making it." We have already found occasion to note that when there was not a point of pleading involved, Baron Parke was as broad-minded and sensible a judge as could be desired.

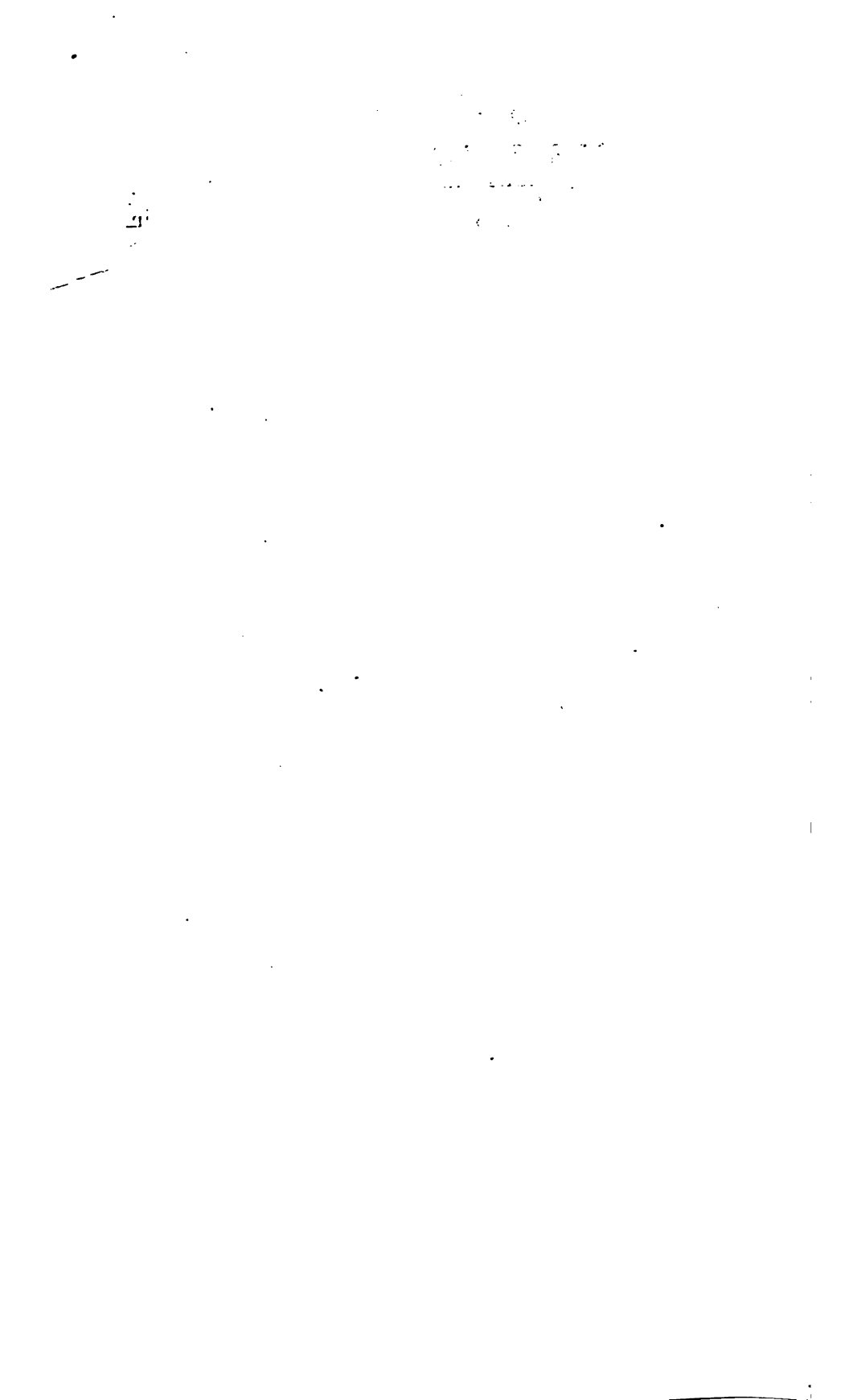
Wiles v. Woodward, p. 764, is an interesting example of conversion by estoppel.

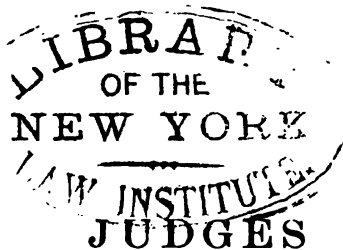
A learned friend writes to suggest that *Forster v. Hoggart*, 81 R. R. 528, should have been accompanied by a reference to ss. 19—21 of the Conveyancing Act, 1881. We hardly think our readers need to be told that mortgagees now have a statutory power of sale, or that its terms and incidents are not necessarily the same as those of any express power which may have come before the Court in an earlier case. Our learned correspondent adds that *Forster v. Hoggart* seems now to have but a limited application. As regards England, we agree; but we have to consider other jurisdictions as well, and we do not think it would have been safe to treat the case as wholly devoid of practical utility.

Our correspondent further points out that the difference between questions of conveyance and questions of title, as to which Lord Campbell put an interlocutory question (81 R. R. at p. 536), had already been explained by Lord Langdale in *Sidebotham v. Burrington*, 52 R. R. 212 (3 Beav. 524).

F. P.







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HIGH COURT OF CHANCERY.

1848—1850.

(11 & 12 VICT.—13 & 14 VICT.)

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SIR R. M. ROLFE	
LORD TRURO, 1850—1852	<i>Lord Chancellor.</i>
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SIR JAMES WIGRAM, 1841—1850	
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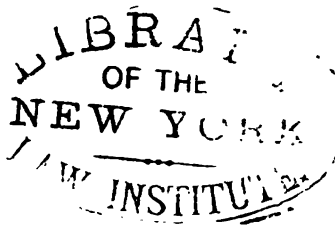


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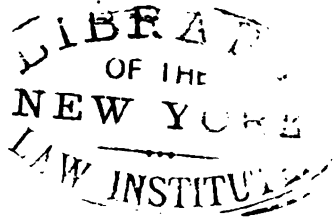
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The Revised Reports.

VOL. LXXXII.

CHANCERY.

TOFT *v.* STEPHENSON.

(7 Hare, 1—19; S. C. on app. 1 D. M. & G. 28; 21 L. J. Ch. 129; 15 Jur. 1187.)

[AFFIRMED on appeal as reported in 1 D. M. & G. 28.]

PETRE *v.* DUNCOMBE (1).

(7 Hare, 24—28; S. C. 17 L. J. Ch. 370; 12 Jur. 24.)

To a bill by the covenantee for specific performance of a covenant entered into by a tenant in tail in remainder, to disentail the estate after the decease of the tenant for life, judgment-creditors of the tenant in tail, whose debts had been made charges on his estate, under the Judgments Act, 1838 (1 & 2 Vict. c. 110), were not necessary parties.

THE bill stated, that, by an indenture of the 3rd of February, 1823, the plaintiff became a surety for the payment of an annuity granted by the defendant to one Downes; and that, by an indenture dated the 28th of February, 1823, duly registered at Wakefield, made between the defendant and the plaintiff,—reciting the will of Henry Duncombe, dated in 1799, whereby he devised his estates at Burton Leonard and elsewhere in the county of York, to his nephew Thomas Duncombe, for life, with remainder to trustees to preserve contingent *remainders, remainder to the use of the first son of the body of the said Thomas Duncombe, with divers remainders over: reciting, also, that the testator died in April, 1818; and that the defendant was the first son of Thomas Duncombe,—the defendant,

(1) *Banks v. Small* (1887) 36 Ch. D. 716, 56 L. J. Ch. 832, 57 L. T. 292.)

PETRE
v.
DUNCOMBE.

in order to indemnify the plaintiff against his liabilities under the deed of the 8rd of February, 1823, granted and demised the said estates unto the plaintiff, his executors, administrators, and assigns, for the term of 500 years, to commence and be computed from the decease of Thomas Duncombe, without impeachment of waste, upon trust, by selling, mortgaging, or otherwise disposing of the premises, or by means of the rents and profits thereof, to indemnify the plaintiff, his heirs, &c. from all costs and damages by reason of the plaintiff having become surety for the payment of the annuity : and the defendant thereby, for himself, his heirs, executors, and administrators, covenanted, promised, and agreed with the plaintiff, his heirs, executors, administrators and assigns respectively, that the defendant would, at his costs and charges, as soon as conveniently might be after the decease of Thomas Duncombe, suffer and execute such common recovery or recoveries, or other assurances in the law, as by the plaintiff, his heirs, executors, &c., should be reasonably required for more effectually conveying and assuring the said estates to the plaintiff, his executors, &c., for the said term.

The bill stated, that, the defendant having made default in payment of the annuity, the plaintiff had been required to pay various sums in respect of the same ; and that Thomas Duncombe died on the 7th of December, 1847, whereupon the defendant became tenant in tail male in possession of the said estates.

[*26]

The bill prayed that the defendant might, in performance *of his said covenant, be decreed, at his own expense, to execute forthwith, and afterwards duly enrol and perfect such a disposition, under the provisions of the Statute for the Abolition of Fines and Recoveries, as would be effectual for the purpose of barring and defeating his estate in tail male of and in the said estates, and all remainders, reversions, estates, rights, titles, interests, and powers, to take effect after the determination or in defeasance of such estate in tail male, and for effectually conveying and assuring the same estates to the uses of the plaintiff, for the residue of the said term of 500 years, upon the trusts of the said indenture.

The defendant by his answer said, that, both previously and subsequently to the date and execution of the deed of February, 1823, he (the defendant) had executed for valuable consideration several other deeds which he was advised might contain covenants on his part to execute a disentailing deed of the said estates in favour of the parties to such deeds. The defendant also stated,

that various judgments were recovered against him, which had been and were duly registered in the West Riding, and with the Senior Master of the Court of Common Pleas at Westminster, and were still unpaid and unsatisfied; and the defendant was advised, that he could not execute a disentailing deed without materially affecting the rights of the said several incumbrancers. The defendant also stated, that other parties, therein named, had filed a bill in this Court against him, praying that he might be decreed to execute a proper disentailing deed, in pursuance of a covenant contained in a certain deed of May, 1829. The defendant submitted, that all or some of such incumbrancers were necessary parties to the suit.

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The cause was set down upon the objection for want of parties.

[27]

Mr. Wood and Mr. Southgate, for the defendant, argued, that, under the stat. 1 & 2 Vict. c. 110, s. 13, the judgment-creditors of the defendant had acquired specific charges upon the estates in question; and that the legal estate ought not to be transferred to the plaintiff or any other party by a decree of the Court in their absence. The cases of *Roe d. Crow v. Baldwere* (1), and *Martin v. Strachan* (2), were referred to with reference to the operation of a fine or recovery, and the possibility that other conflicting incumbrances might thereby be introduced.

Mr. Rolt and Mr. Messiter, for the plaintiff:

The parties to the contract are the only necessary parties to a suit for specific performance: *Wood v. White* (3), *Nelthorpe v. Holgate* (4). The disentailing of the estate will not prejudice the judgment-creditors; but, on the contrary, will be a step for their benefit: — *v. Walford* (5).

THE VICE-CHANCELLOR:

The effect of the objection is, that the absent parties, whether they claim under Mr. Duncombe, or by force of the Act of Parliament, are mere incumbrancers upon the estate.

[*28]

Now this is a bill for specific performance; and nothing can be more clear as a general rule, than that, in such a suit, no persons are necessary parties, except the parties to the contract.

If, as it was suggested, any of the incumbrancers referred to have priority over the plaintiff, the decree for specific performance of the

(1) 2 R. R. 550 (5 T. R. 104).

(4) 66 R. R. 46 (1 Coll. 203).

(2) 2 R. R. 552, n. (5 T. R. 107, n.).

(5) 28 R. R. 129 (4 Russ. 372).

(3) 48 R. R. 152 (4 My. & Cr. 460).

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covenant in this suit will not affect them. Incumbrancers so circumstanced are never made parties to a suit for specific performance. If it be doubtful whether the incumbrancers have priority over the plaintiff I cannot compel him to make them parties, though he might perhaps have elected to make them so. Their absence may, by possibility, embarrass the plaintiff at the hearing of the cause. But I cannot in this stage of the cause decide that the plaintiff shall not enforce the contract against the defendant only—wholly, if he can do so,—partially, if the defendant shall have put it out of his own power, or it shall otherwise have become impossible for the plaintiff to get complete relief against the defendant.

The objection goes to the plaintiff's right to relief, and not to the question of parties.

1849.
April 19, 20,
21.

FUSSELL v. ELWIN.

(7 Hare, 29—33.)

WIGRAM,
V.-C.

[29]

If a suit be instituted against defendants jointly and severally liable, the plaintiff cannot, after the cause stands for hearing, dismiss his bill, or waive the relief, as to some or one of the defendants, and prosecute the cause against the others only, and, therefore, where one of the defendants became bankrupt during the progress of the cause: at the hearing, the assignees in the bankruptcy were held to be necessary parties.

If, at the hearing of the cause, it be stated and admitted, that a defendant on the record has become bankrupt since the institution of the suit, the plaintiff is not (in ordinary cases) at liberty to disregard the bankruptcy, and take a decree against the defendant, as if no bankruptcy had occurred; but the cause will be ordered to stand over, that the assignees may be made parties.

Costs of the day are not given, where a cause is ordered to stand over at the hearing, owing to an abatement or imperfection of the suit, which happened after the cause was at issue.

THE bill was filed against four trustees of an ascertained and appropriated residue, by the cestui que trust, to recover the fund which three of the trustees had permitted to be misapplied and lost by the default of the fourth. The trustee by whose acts the loss arose died after the institution of the suit, and his representatives were brought before the Court. Afterwards, one of the surviving trustees became bankrupt. In this state of things the suit was brought to a hearing.

The *Solicitor-General* and *Mr. Batten*, for the plaintiffs, proposed to take the decree against the two surviving trustees, and the representatives of the deceased trustee, omitting the trustee

who had become bankrupt. They suggested, that the plaintiff was entitled, under the 32nd Order of August, 1841, to sue one or more of the trustees at his discretion: *Perry v. Knott* (1), the authority of which is not affected, as to this point, by the case of *Lenaghan v. Smith* (2).

FUSSELL
*
ELWIN.

Mr. Wood and *Mr. Gordon*, for the defendants, submitted, that the assignees of the bankrupt trustee were necessary parties to the suit. * * Every defendant was entitled to know, at the outset of the suit, whether he was to be jointly or severally charged. It was not an answer to this argument to say, that if the plaintiff obtained a decree against all, he might proceed to execution against any: the defence was framed with reference to the question of what decree the Court ought to make, and not to the question how the plaintiff might think proper to deal with it when made. The defendant might also be materially prejudiced, with respect to his remedy over, or to contribution, by the circumstance of other persons liable not being parties to the suit.

[30]

The *Solicitor-General*, in reply. * * *

THE VICE-CHANCELLOR :

[31]

I assume, for the purpose of my present decision on the question of parties, that this case is one in which the plaintiffs are not under the necessity of proceeding by an administration suit; that the executors have committed a breach of trust for which they are jointly and severally liable; and that the 32nd Order of August, 1841, had, in that state of circumstances, given the cestuis que trust who have been injured by the breach of trust, an option to proceed, either against all the trustees, or against some or one of them. The plaintiffs *having, as I assume, that option, have exercised it by filing a bill against all. If at the hearing in such a case the plaintiffs had desired arbitrarily to dismiss their bill as against some or one of the defendants, and to have a decree made against the others, such an application would have been refused. The Court would have said, that if the plaintiffs had originally elected to file their bill against some or one only, those against whom the bill was filed might have proved such a case as would have shown that they ought not to be so dealt with. It would not be difficult to suggest many cases admitting of such a defence.

[*32]

(1) 59 R. R. 502 (5 Beav. 293).

(2) 78 R. R. 94 (2 Ph. 301).

FUSSELL
v.
ELWIN.

In the principal case the suit came before the Court for hearing, and, for anything that appeared upon the proceedings, there was no reason why a decree against all the defendants should not be made. It was said, however, by counsel, and admitted on all sides, that one of the parties had become bankrupt. That being the case, the common course was, to let the case stand over for the purpose of bringing the assignees before the Court by supplemental bill. The plaintiff, however, resisted the adoption of this course, and insisted, that, inasmuch as the bill might have been filed originally against some only of the defendants, he was certainly entitled to a decree against the persons named as defendants other than the bankrupt; or if not, that he was at liberty to disregard, and to require the Court to disregard, the fact of the bankruptcy, and take a decree against all the defendants on the record, as if the bankruptcy had not taken place. I think that neither of those courses is open to the plaintiff; but that the cause must be dealt with in the usual way, by directing it to stand over, giving the plaintiffs liberty to make the assignees of the bankrupt parties by supplemental bill.

[33] *Mr. Wood*, for the defendants, asked for the costs of the day. But

The VICE-CHANCELLOR said, it was not the practice in such a case to give costs.

1848.
July 7, 8.

WIGGAM,
V.-C.
[38]

WILLETTS v. WILLETTS.

(7 Hare, 38—41; S. C. 17 L. J. Ch. 457; 12 Jur. 670.)

Where a testator, after giving legacies to his daughters for their respective lives, with remainder to their respective issue, and in default of issue, the share of the daughter so dying to the survivors, directed, that in case any or either of his daughters should happen to die before such legacy or bequest should have become vested in her, leaving issue, then such legacy or bequest should descend to, or become the property of, such issue: it was held, that the word "survivor" must be taken in its strict sense; but that, under the clause of substitution, a survivor's share of a legacy to a daughter who died without leaving issue (such survivor's share being necessarily contingent upon survivorship) passed to the children of a daughter of the testator who died in his lifetime, leaving issue that survived him.

THE will of J. Willetts contained, with other legacies, a bequest of 800*l.* to trustees, upon trust, to invest and pay the interest unto and amongst his daughters, Alice, Mary, Sarah, and Martha, equally, share and share alike, during the term of their respective

[*39]

lives, their respective receipts alone, notwithstanding coverture, to be the only sufficient discharge for the same; and in case of the decease of any or either of them leaving issue of her or their body or bodies lawfully begotten, the testator gave and bequeathed one fourth part of the said principal sum of 800*l.* to be equally divided amongst such issue, and if but one, to such one only; and in default of issue, then the part or share of her or them so dying, he gave and bequeathed unto the survivors of them, share and share alike, and if but one, to such one only. After some other bequests in the same will came the following clause: "And I hereby will and direct, that, in case any or either of my children to whom or to whose benefit any legacy or bequest is hereinbefore given, shall happen to depart this life before such legacy or bequest shall have become vested in him, her, or them, leaving lawful issue of his, her, or their body or bodies lawfully begotten, then such legacy or bequest shall descend to and become the property of such issue, if more than one, to be equally divided between them, share and share alike; and if but one, then the whole to such one only."

WILLETTS
v.
WILLETTS.

Sarah, one of the four daughters of the testator, died in his lifetime leaving children, and the other three daughters survived him. The sum applicable to the payment of the legacy was divided into four parts, and carried over to the separate accounts of the respective families. Mary, another daughter, then died, without having had any issue.

The question was, to whom the fourth share, which stood to the account of "Mary and her children, if any," now belonged.

Mr. De Gez, for the children of Sarah, claimed one-third of the share of Mary, arguing, first, that "survivors" should be read "others": *Wilmot v. Wilmot* (1), *Aiton v. Brooks* (2), *Doe v. Wainwright* (3), *Cursham v. Newland* (4); and, secondly, that the last clause, which substituted the children of a legatee for the parent, where the parent should die before the legacy became vested, amounted to a gift of Sarah's share of Mary's legacy to the children of Sarah, in the events which had happened: *Bouverie v. Bouverie* (5).

[40]

Mr. Craig, for Martha and her children; and

(1) 6 R. R. 196 (8 Ves. 10).

(2) 40 R. R. 110 (7 Sim. 204, 208).

(3) 2 R. R. 634 (5 T. R. 427).

(4) 2 Beav. 145, 149; see 50 R. R. 133.

(5) 78 R. R. 111 (2 Ph. 349).

WILLETTS
v.
WILLETTS

Mr. Metcalfe, for Alice and her children, contended, that the word "survivors" must be taken in its strict and natural sense : *Milsom v. Awdry* (1), *Davidson v. Dallas* (2), *Crowder v. Stone* (3), *Taylor v. Beverley* (4), *Leeming v. Sherratt* (5). The clause referred to was intended by the testator to apply to a legatee, who, by surviving him, acquired the capacity of taking a vested interest in the legacy, and cannot properly be construed as giving to children, by substitution, what the parent was not capable of taking at any time after the will came into operation.

THE VICE-CHANCELLOR :

[*41] I retain the opinion which I have expressed in other cases (6), as to the construction of the word "survivors," *and the circumstances in which the Court has read that word as "others." I think that the strict sense of the word must prevail, unless there is anything in the context of the instrument which requires a different sense. There is, however, in this will a subsequent clause, disposing of the legacy in the event of either of the children dying before it became vested, the terms of which appear to me sufficient to carry this fund to the children of the testator's daughter Sarah. The interest given to Sarah was contingent upon certain events. If Sarah died before her sisters, no interest in their shares could vest in her. That event, in fact, happened. Sarah was living at the date of the will ; she had children, and died in the lifetime of the testator. The clause which I have referred to then came into operation. The interest which would have become vested in the mother if she had survived is given to the children. I think there are authorities for adopting this construction of the will: *Willing v. Baine* (7), *Walker v. Main* (8), *Humberstone v. Stanton* (9). Although it is probable that the event which has happened was not contemplated by the testator, yet it is within the strict language of the bequest.

- | | |
|--------------------------------------|---|
| (1) 5 R. R. 102 (5 Ves. 465). | (6) See <i>Leeming v. Sherratt</i> , 62 |
| (2) 9 R. R. 350, 352 (14 Ves. 576, | R. R. 1 (2 Hare, 14). |
| 578). | (7) 3 P. Wms. 113. |
| (3) 27 R. R. 68 (3 Russ. 217). | (8) 20 R. R. 202 (1 J. & W. 1). |
| (4) 66 R. R. 22 (1 Coll. C. C. 113). | (9) 12 R. R. 243 (1 V. & B. 385). |
| (5) 62 R. R. 1 (2 Hare, 14). | |

SHEFFIELD *v.* VON DONOP.

(7 Hare, 42—49; S. C. 17 L. Ch. 481; 12 Jur. 672.)

1848.
July 17, 22.WIGRAM,
V.-C.
[42]

Two funds were settled for the benefit of a husband and wife for their respective lives, with remainder to their children, as to one fund, as the parents should appoint, and as to the other fund, in equal shares. The husband and wife resided abroad, and received the dividends through Coutts & Co., and, previously to the marriage of one of their sons, they signed a document, expressing, that they thereby disposed of a certain sum "standing in the English Bank of Coutts & Co." in favour of such son and his wife, and the children of the intended marriage: Held, that the settled funds were sufficiently referred to by the instrument of disposition; that it did not refer exclusively to the fund subject to the power of appointment; that the son was entitled to his share of the other fund, and to have the sum mentioned in the instrument of disposition made up out of the fund subject to the appointment.

An original power of appointment is not destroyed or exhausted by a revocable appointment. Where that revocable appointment has been subsequently revoked the original power may revive.

By a settlement made in February, 1805, on the marriage of George Wilhelm, Baron Von (1) Donop, and Charlotte Augusta, his wife, 5,000*l.* Consols, the property of the wife, was vested in trustees, upon trust for the husband for his life, and, after his decease, upon trust for the wife for her life; and after the decease of the survivor of them, (the husband and wife), upon trust for all or such one or more, exclusively of the other or others of the children or child of the said marriage, or the issue of such children or child born in the lifetime of the said husband and wife, or of the survivor of them, in such parts, shares, and proportions, at such time or times, and in such manner and form, as the husband and wife, or the survivor of them, from time to time, or at any time or times, by a deed or deeds, writing or writings, with or without power of revocation, sealed and delivered and attested by two witnesses, or by his or her last will and testament, attested by the like number of witnesses, should direct, limit, and appoint; and in default of such appointment, or in case of an incomplete appointment, the said trust monies, or the unappointed parts thereof, should be in trust for all and every the children or child of the said marriage, who, being sons, should attain twenty-one, or die under that age leaving issue; or, being daughters, should attain that age or be married, to be equally divided among them: and it was thereby declared, that no child taking any part or share *of the said trust monies under or by virtue of any direction or appointment to be

[*43]

(1) [*Sic*: the prefix ought not, of course, to have been printed with a capital.—F. P.]

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made by the husband and wife, or the survivor of them, should have or be entitled to any further or other share of the unappointed part of the said trust monies, without bringing such his or her appointed part or share into hotchpot.

There was issue of the marriage, six sons and one daughter. One son and the daughter died under twenty-one, and unmarried.

By a deed-poll, dated in July, 1830, Baron and Baroness Von Donop appointed the trust fund amongst their sons equally, reserving a power of revocation. By a deed, dated in November, 1834, Baron and Baroness Von Donop revoked the appointment of 1830, and appointed 2,465*l.* 3*s.* 7*d.*, part of the said trust funds, subject to their life interests, to Wilhelm, their eldest son, absolutely; and that 2,531*l.* 16*s.* 5*d.*, the residue, should, upon determination of their life interests, be in trust for the then five younger sons of the Baron and Baroness Von Donop in equal shares. A power of revocation of these appointments was also thereby reserved to the Baron and Baroness Von Donop.

By an indenture, dated the 15th of June, 1820, sums of 1,295*l.* 13*s.* 8*d.* Consols, and 800*l.* Reduced Annuities were settled upon trust for Baroness Von Donop for her life, and after her decease, upon trust for all her children, in equal shares as tenants in common, the shares of the sons to vest at twenty-one, and those of the daughters at twenty-one or marriage, with benefit of survivorship between such children, as to the original and accruing shares, in case of any of them dying before such periods of vesting. Of these sums the plaintiff Grant was the surviving trustee.

[44]

The trustees of the three sums of stock empowered Messrs. Coutts & Co. to receive the dividends, and place them to the account of Baroness Von Donop, and they were for many years received and disposed of by them according to her directions. In contemplation of the marriage of their second son, August Werner Frederick, Baron and Baroness Von Donop executed an instrument in the German language, unattested, of which the following is a translation: "We, the undersigned at the foot hereof, dispose hereby in favour of our son August Werner Frederick Von Donop, lieutenant in the service of the Prince of Lippe, that he shall receive from the survivor of us a capital property of 7,000 dollars ⁽¹⁾ Prussian currency, which stands in the English Bank of the late — Coutts, Esq., & Co. in London. Further, that, until our death he shall receive from us a yearly

(1) Stated by the report to be equal to 1,000*l.*

allowance of 300 dollars, say 300 dollars in Prussian currency. SHEFFIELD
V. ^{E.}
VON DONOP.
We hereby further give him liberty and power to dispose, even during our lifetime, of the above mentioned 7,000 dollars currency for the benefit of his intended wife, Miss Augusta Elizabeth Charlotte Lorenz; and in case of children of the future marriage, then in their favour. DETMOLD, the 23rd August, 1839."

Prior to the marriage of their fifth son Leopold Robert Sheffield, Baron and Baroness Von Donop signed and gave to him a writing, unattested, of which the following is a translation: "We, the undersigned, grant to our fifth son, Leopold Robert Von Donop, lieutenant in the 28th Royal regiment of infantry, full permission to contract matrimony with Miss Mathilde Lorenz, daughter of the late Captain Lorenz, of Detmold. We, however, promise to pay, and to cause to be delivered well and truly, in ready money every year, to our son aforesaid, *in order to his further advancement, the annual sum of 150 dollars for his maintenance, and also a like sum for his wife—that is to say, 300 dollars in all for both parties. With regard to the pecuniary circumstances of our son Leopold, after our decease, they are the same as those which have been stipulated in reference to our son August on the occasion of his marriage with Augusta Lorenz. Nevertheless, before the marriage takes place, we, the two undersigned parties, are willing to ratify the above by a judicial act.

[*45]

"WOBEL, 27th April, 1843."

Baron and Baroness Von Donop had not, in 1839, or subsequently, in the Bank of Messrs. Coutts & Co. any capital monies or securities, or any other monies, except the dividends of the trust funds, and a sum of 128*l.* 2*s.* paid in by the plaintiff Grant, in July, 1839, to the account of Baroness Von Donop, in respect of monies received from the French Government. At the date of the instrument of August, 1839, there was a balance of 14*l.* 8*s.* 7*d.*, and at that of April, 1843, there was a balance of 11*l.* 8*s.* 8*d.* at the Bank, to the account of Baron and Baroness Von Donop. No notice of either instrument was given to the trustees of the fund, until after the death of the Baron and Baroness Von Donop. They died, leaving the said three sons, and two others, Edward and Frederick, surviving.

The bill was filed, in May, 1847, by the surviving trustees of the settlement of February, 1805, one of whom was also the trustee of the settlement of June, 1820, against the personal representative and children of August Werner Von Donop, who was then dead, Leopold

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Robert Sheffield and his wife and two daughters, and Edward and Frederick, the two other sons; and it prayed, that the rights and interests of the said several defendants *in and to the said sum of 2,584*l.* 16*s.* 5*d.* Consols, the residue of the trust fund of 5,000*l.*, might be declared, and that the plaintiffs might be at liberty to divide, transfer, and pay the same, and the dividends accrued thereon, to such parties respectively as this Court should direct.

Mr. Follett, for the trustees.

Mr. Shapter, for the defendants Edward and Frederick Von Donop, two of the sons of Baron and Baroness Von Donop, argued, that the power of appointment was exhausted by its exercise, either in July, 1830, or in November, 1834. * * The instruments of 1839 and 1843 cannot be treated as appointments; they neither describe the fund nor refer to the power: *Hughes v. Turner* (1), *Denn v. Roake* (2). * * *

[*47] *Mr. Lloyd*, for the representatives and children of *August Von Donop, and Leopold Robert Sheffield Von Donop, and his wife and children. * * *

The VICE-CHANCELLOR, at the conclusion of the argument, expressed his opinion to be that the power of appointment had continued, notwithstanding the absence of any express reservation of such power accompanying the power of revocation. He was also of opinion that the reference to funds "standing in the English Bank of the late — Coutts, Esq., & Co., of London," sufficiently pointed to the funds comprised in the settlement of 1805, and also to those in the settlement of 1820. The question was, whether, in the case of so general and inaccurate a description, the language should be strictly confined to the single fund with which the parties had power to deal, or whether their intention would not be carried out by adopting the literal sense of the expression as referring to all the funds, the dividends of which were paid through the banking house of Coutts?

THE VICE-CHANCELLOR:

[*48] The first question is upon the effect of the settlement *of the 23rd of August, 1839, on the marriage of August Werner Frederick Von Donop. I continue of opinion, that the residue of the stock originally comprised in the settlement of February, 1805, and the

(1) 41 B. R. 171 (3 My. & K. 666). (2) 33 B. R. 1 (5 B. & C. 720).

residue of the stock originally comprised in the settlement of June, 1820, or either of those funds, are and is sufficiently indicated by the words "which stand in the English Bank &c."

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Another question has been raised. The former of the above funds was subject to the joint appointment of Baron and Baroness Von Donop. The latter stood limited absolutely to Baroness Von Donop for life for her separate use, without power of anticipation, with remainder to the children equally. One-fourth or one-fifth of this fund therefore belonged to August Werner Frederick Von Donop, and over this Baron and Baroness Von Donop had no power; and the question raised is, whether the 7,000 dollars, in the settlement of the 23rd of August, 1839, is to come wholly out of the former fund, or whether an apportioned part only is to come out of that fund?

First, is the language of the settlement to be read as applying in terms to the former fund only, or as applying to both? I think, in construction, to both. In many cases it would be right to hold, that the words should be restrained so as to confine them to the property subject to the power, upon the presumption that the parties intended only what they lawfully could do, although their language may, in fact, express something more. But in a case circumstanced as this is—a case in which the language of the parties is so inaccurate as well as general—it is difficult to found such a presumption, and, in such a case, it is safer to abide by the words of the parties. In point of construction, therefore, I think the words *must be read as giving the 7,000 dollars out of the two funds.

[*49]

Another and an important point, however, remains. Baron and Baroness Von Donop had not, as I have already observed, power to charge the latter fund: must not the 7,000 dollars be thrown upon the former, over which they had power? If the latter fund belonged wholly to a stranger, that point might perhaps be successfully made. But one-fourth or one-fifth belonged to August Werner Frederick Von Donop, and the appointment (as I now assume) applies to the latter fund as well as to the former. Now the words of the instrument are not, "we give him 7,000 dollars," but, "we dispose that he shall receive from the survivor of us" 7,000 dollars; and this is satisfied by giving him, out of the former fund, over which the power existed, so much as, with the fifth of the fund in the settlement of 1820, would make up the 7,000 dollars which the instrument was designed to secure to him. The

SHEFFIELD settlement of 1843, made on the marriage of Leopold, will have the
VON DONOP. like operation and effect. It is a case in which the safest and best
 rule of construction is to give to every word a literal interpretation.

The appointment of November, 1834, extended to the whole fund, and that appointment remains in force, except as to the difference between the shares which August and Leopold take out of the funds in the settlement of 1820, and the sums of 7,000 dollars given to them by the instruments of 1839 and 1843; and, after setting apart sufficient to make up these sums, the residue of the 2,534*l.* 16*s.* 5*d.* will be divided amongst the four younger sons. The operation of the hotchpot clause is excluded by the appointment of the whole fund.

1848.

Nov. 3, 4, 7.

WIGRAM,
V.-C.

[50]

HOLLOND v. TEED (1).

(7 Hare, 50—57.)

Under a guarantee given to a banking-house, consisting of several partners, for the repayment of such bills, drawn upon them by one of their customers, as the Bank might honour, and any advances they might make to the same customer, within a certain time: it was held—

That the guarantee ceased upon the death of one of the partners in the Bank, before the expiration of the time to which the guarantee was expressed to extend.

That bills accepted before the death of the partner, and payable afterwards, were within the guarantee.

That the amount guaranteed could not be increased by any act of the continuing firm and the customer, after the death of the partner, although such amount might be diminished by such act.

That, in the particular form of the guarantee, the amount guaranteed in respect of the bills honoured by the Bank, was not to be reduced by the amount of a balance owing from the Bank to the customer when the guarantee ceased, such balance having been afterwards paid in the course of business between the continuing firm and the customer.

A suit on behalf of the creditors of Thomas Teed.—Ladbroke, Kingscote & Co., bankers, claimed to be creditors in respect of guarantees given to the testator, the first of which was as follows:

“LONDON, June 29, 1839.

“GENTLEMEN,—I hereby agree to guarantee to you the repayment of any bills you may honour, to be drawn upon your house by the firm of Carruthers & Co., of Manchester, distillers, and any advances you may make for the said firm of Carruthers & Co. from time to time, not exceeding the sum of 8,000*l.* This guarantee to extend to any current amount or ultimate balance, not exceeding

(1) *In re Sherry* (1883) 25 Ch. D. 692, 53 L. J. Ch. 404, 50 L. T. 227.

the sum of 8,000*l.* and interest; and to continue in force for one year from the date hereof.

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P.
TEED.

“I am, &c.,

“THOMAS TEED.”

The second guarantee was given on the occasion of one of the firm of Carruthers & Co. retiring from business: it was as follows:

“LONDON, 27th January, 1840.

“GENTLEMEN,—Notwithstanding Mr. John Carruthers has retired from the partnership of Carruthers & Co. of Manchester, distillers, and which business is now carried on by Mr. Frederick F. Carruthers, under the said firm, on his own account, I do hereby agree, in consideration of your giving credit to and honouring the draft of the said firm of Carruthers & Co., to continue the guarantee *given by me to your house for the sum of 8,000*l.* for and on behalf of the said F. F. Carruthers alone, upon the same terms, condition, and period as expressed in the guarantee given by me to your house when the said John Carruthers was a partner in the said business. This guarantee for the said F. F. Carruthers to extend to any current amount or ultimate balance not exceeding, as to my liability, the sum of 8,000*l.* and interest, and only to continue in force for the same period as mentioned in my former guarantee.

[*51]

“I remain, &c.,

“THOMAS TEED.”

During the year to which the guarantee was limited, divers payments were made by Ladbroke, Kingscote & Co. to Carruthers & Co., and divers remittances were made by the latter to the former, and four bills of exchange, of different dates, amounting together to 1,975*l.*, were drawn by Carruthers & Co., payable at the house of Ladbroke, Kingscote & Co., and accepted by the latter. On the 14th of March, 1840, after the acceptance of the four bills, and before any of them became due, Felix Calvert Ladbroke, one of the partners in the firm of Ladbroke, Kingscote & Co., died. On the day of his death a balance of 124*l.* 10*s.* 7*d.* was due from the Bank to Carruthers & Co. on the several accounts, exclusive of the four bills. The four bills were paid by Ladbroke, Kingscote & Co. within the year mentioned in the guarantee.

After the death of Felix Calvert Ladbroke, the course of business was continued between the continuing firms of Carruthers & Co. and Ladbroke, Kingscote, & Co. and divers payments and remittances were made by and to these firms respectively, and other bills were

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[*52]

accepted and paid by the Bank. On the 15th of June, 1840, the *testator gave Ladbroke, Kingscote & Co, notice that he withdrew his guarantee. On the 14th of July, 1840, Carruthers & Co. became bankrupt.

Ladbroke Kingscote, & Co. brought their action against the testator on the guarantees, and a verdict was entered for the plaintiffs, subject to a special case; but the action abated by the death of the testator.

Ladbroke, Kingscote & Co. having carried in their claim as creditors in this suit, the Master was of opinion that the guarantees ceased at the death of Felix Calvert Ladbroke, and that all remittances made by Carruthers & Co. to Ladbroke, Kingscote & Co., subsequent to that event, upon the general account of Carruthers & Co., were applicable to the discharge of any balance that might be due in respect of the four bills accepted by the banking-house before, and paid by the surviving partners after, the death of Felix Calvert Ladbroke, in preference to the discharge of any bills which had been both accepted and paid by the surviving partners after his death; and the finding of the Master was in conformity with this opinion. Ladbroke, Kingscote & Co. excepted to the report.

The *Solicitor-General* and *Mr. Roundell Palmer* in support of the exceptions:

[*53] First, the guarantee was not to the members of the firm by their individual names, but by the name of the firm, and it is expressed to extend to all bills drawn upon their "house." *Barclay v. Lucas* (1) is an authority which, though to some extent shaken by subsequent decisions, may still be relied on, as showing that a guarantee may continue so *long as the purpose continues for which it was given. There was no special confidence reposed in any particular member of the firm. Secondly, even if the guarantee ceased at the death of Felix Calvert Ladbroke, the bankers were not bound to appropriate, and had not appropriated, the payments or remittances made to them by Carruthers & Co. after the death of Felix Calvert Ladbroke, in the first place, in discharge of the balance due in respect of the four bills, but might apply all such subsequent payments and remittances to the new account between Carruthers & Co. and the surviving partners in the Bank: *Clayton's case* (2) and *Jones v. Maund* (3). A surety has no right to require the creditor to make

(1) 1 B. R. 202 (1 T. R. 291).

(3) 51 B. R. 384 (3 Y. & C. 347).

(2) 15 B. R. 161 (1 Mer. 572).

any specific appropriation of his receipts or payments: *Williams v. Rawlinson* (1), *Kirby v. Duke of Marlborough* (2); nor has he any right to require that the appropriation shall be made in the manner most beneficial to him. Thirdly, the balance of 124*l.* 10*s.* 7*d.* was paid by the surviving partners to Carruthers & Co., and forms no part of the account in respect of the bills which had been accepted on the faith of the guarantee.

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TEED.

Mr. Rolt, Mr. Willcock, and Mr. Taylor, for the executors and the plaintiff, [on the first point cited *Dry v. Davy* (3), *Myers v. Edge* (4), and other cases; and on the second point cited *Bodenham v. Purchas* (5), *Sterndale v. Hankinson* (6), and other cases.]

The amount of the bills for which the surety was liable, ought certainly to be reduced by the sum of 124*l.* 10*s.* 7*d.*; the balance owing to Carruthers & Co. by the Bank on the day that Felix Calvert Ladbroke died.

[54]

(It was, before the conclusion of the argument, conceded, that, upon the later authorities, the guarantee must be taken to have ceased at the death of Felix Calvert Ladbroke.)

THE VICE-CHANCELLOR:

On the 14th of March, 1840, the day on which Felix Calvert Ladbroke died, the state of the account between the firm of Ladbroke, Kingscote & Co. and Carruthers & Co., was as follows: A cash balance of 124*l.* 10*s.* 7*d.* was owing from Ladbroke, Kingscote & Co. to Carruthers & Co., and four bills of exchange, amounting together to 1,975*l.*, drawn by Carruthers & Co. upon, and accepted by, the bankers, Ladbroke, Kingscote & Co., were running. *The guarantee given by Teed to the bankers covered this account.

[*55]

After the death of Felix Calvert Ladbroke, the surviving partners of Ladbroke, Kingscote & Co. carried on their banking transactions with Carruthers & Co., in the ordinary way between bankers and a customer, by applying to those transactions the ordinary rules governing the appropriation of payments in account. The 124*l.* 10*s.* 7*d.* was paid before any of the four bills became due. Afterwards the bills became due, and were

(1) 28 R. R. 584 (3 Bing. 71).

(4) 4 R. R. 436 (7 T. R. 254).

(2) 14 R. R. 537 (2 M. & S. 18).

(5) 20 R. R. 342 (2 B. & Ald. 39).

(3) 50 R. R. 314 (10 Ad. & El. 30).

(6) 27 R. R. 201 (1 Sim. 393).

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paid by the bankers. The bankers claim to be paid the amount of those bills out of the estate of Teed, the surety. The executors of Teed resist the claim altogether; but contend, that, if the estate of Teed were liable under the guarantee, for the amount of the bills, credit must at all events be given for the 124*l.* 10*s.* 7*d.* due from the bankers to Carruthers & Co., when Felix Calvert Ladbroke died.

Upon the principal point, the liability of Teed's estate under the guarantee, I decided in favour of the bankers, but reserved my opinion upon the other point relating to the 124*l.* 10*s.* 7*d.*

In considering this point, the case will be simplified by supposing Carruthers & Co., after the 14th March, 1840, and before any of the bills became due, to have drawn a cheque upon the bankers for the exact balance of 124*l.* 10*s.* 7*d.*, and that such cheque had been paid, and no other transaction had taken place between the bankers and Carruthers & Co. after the 14th of March, 1840,—would Teed's estate, in that simple case, have been entitled to a credit for the 124*l.* 10*s.* 7*d.* when sued upon the bills? I put the case in this way, in order that it may be seen that I do not (as was suggested *at the Bar) question the fact, that the 124*l.* 10*s.* 7*d.* was paid in account by the bankers to Carruthers & Co.

[*56]

The exact extent of Teed's liabilities, under the guarantee, on the 14th of March, 1840, is shown by the state of the account between the bankers and Carruthers & Co. on that day; those liabilities might be diminished and finally extinguished by acts done after that day; for the ultimate claims of the bankers against Carruthers & Co. might be wholly satisfied: but the surviving partners of Ladbroke, Kingscote & Co. could not charge Teed's estate with any advances made by them to Carruthers & Co. after the 14th of March, 1840. Now, the cheque for 124*l.* 10*s.* 7*d.*, I have supposed to have been drawn upon and paid by the bankers, was an advance to Carruthers & Co.; and, as the effect of that was ultimately to make Teed's estate liable for the full amount of the bills, by an act done after the 14th of March, 1840, I thought it deserved consideration, whether, in ascertaining the amount for which Teed's estate was liable under the guarantee, that estate was not entitled to credit for the 124*l.* 10*s.* 7*d.*

I think, however, that the language of the guarantee disposes of the question. The guarantee applies, in terms separately from advances and ultimate balance, to all bills drawn upon and honoured by the bankers. Now it is true, that the surviving partners of

Ladbroke, Kingscote & Co. could not, after the 14th of March, 1840, accept new bills or make new advances in respect of which Teed would be liable under the guarantee. But they might wind up all which were covered by guarantee transactions, on the 14th of March, 1840, in the regular course of business. Unless, therefore, it can be said that the payment of the 124*l.* 10*s.* 7*d.*, whilst the bills were running, leaving the bills, in case *they should be called upon to pay them, to be protected by the guarantee, was not in the regular course of business, I think the surety cannot complain; and if that would be so, in case of a payment by hand or by a remittance, the payment by a cheque cannot alter the case.

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EAST AND WEST INDIA DOCK COMPANY v. LITTLEDALE.

(7 Hare, 57—67.)

The right of the plaintiff in interpleader, is to be protected not merely from double liability, but from double vexation; and he is not therefore bound to show the existence of an apparent title in each of the defendants who are claimants of the property in dispute.

The stakeholder is entitled to relief by suit of interpleader, and is not bound to accept an indemnity from either of the claimants, although the claimant offering indemnity shows an apparent title to the property in dispute.

A defendant in interpleader cannot generally be ordered to interplead, by bringing or defending a suit in respect of the property in question, until he has put in his answer, or the bill is taken *pro confesso* against him; but where the defendant seeks, as an indulgence, time to answer beyond that which the general rule allows, he must satisfy the Court that the case cannot with justice be put in a course for determination without further delay; and, in this case, the further time was granted only upon the defendant forthwith proceeding to try his legal right by defending the action which had been brought by the other defendant, against the stakeholder.

The plaintiff in interpleader undertakes by his suit to use all proper diligence to get in the answer of, or take the bill *pro confesso* against, each of the defendants; and if any delay should occur in the proceedings, any defendant may apply as against the plaintiff, for a dissolution of the injunction, or for the delivery up of the subject of interpleader, as the case may be.

In December, 1847, the ship *Coromandel*, with a cargo consisting partly of 639 bales and 10 half bales of cotton, consigned to the order of Syers, Livingstone & Co., of Bombay, entered the plaintiff's docks, and on the 7th of January, 1848, the bills of lading of the cotton, indorsed to Littledale & Co., were lodged at the dock office. On the 9th of January, 1848, the Dock Company received notice from the solicitors of certain Parsee merchants of Bombay,

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July 18, 25.
Aug. 1, 3, 4
Nov. 25.
Dec. 2, 5, 16,
19, 22.

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[*58]

named Dadaboy Pestonjee and Mancherjee Pestonjee, not to deliver any part of the cotton by the *Coromandel*, without their consent or that of their agents, Forbes & Co.,—the house of Syers, *Livingstone & Co., the purchasers having become insolvent, and the said Parsee house claiming, as unpaid vendors, to stop the cotton *in transitu*. In consequence of this notice the Dock Company refused to deliver the cotton to Littledale & Co., notwithstanding that firm offered to indemnify the Company. On the 31st of January, Littledale & Co. brought trover for the cotton against the Dock Company. The Company on the 17th of February took out an interpleader summons under the statute, calling upon Littledale & Co., and the Parsee merchants, to show cause why they should not appear and state the nature and particulars of their respective claims to the subject-matter of the action, and maintain or relinquish the same, and abide by such order as might be made thereon; and why in the meantime all further proceedings should not be stayed. The summons was served upon Littledale & Co. and upon Forbes & Co., as the agents of the Parsee house, and was heard before Baron Parke. Forbes & Co. appeared, and objected to the jurisdiction of any Judge in this country over the Parsee merchants, natives of, and residing at, Bombay. The matter was from time to time adjourned, but no order was made, the learned Judge having (as the bill stated) been of opinion that the questions between the parties could only be satisfactorily disposed of in the Court of Chancery.

On the 15th of April the plaintiffs filed their bill of interpleader against Littledale & Co., and Dadaboy Pestonjee, and Mancherjee Pestonjee, and obtained the usual injunction to restrain proceedings in the action.

[*59] Littledale & Co. by their answer stated, that they were the holders of the bills of lading of the cotton, for value, long before the arrival of the *Coromandel* in this country; they insisted that there was no ground *for requiring them to interplead, and claimed from the plaintiffs the amount of the loss which they had suffered by the depreciation of the market price of the goods. The other defendants had not answered.

The *Solicitor-General* and Mr. Follett, for the defendants Littledale & Co., moved to dissolve the injunction. * * *

[60] Mr. Wood and Mr. Prior, for the plaintiffs, submitted that they were in a position which rendered a bill of interpleader

proper; and that the action of trover ought not to be allowed to proceed against them: *Stevenson v. Anderson* (1); unless the other claimants of the goods should undertake to defend the action and indemnify the plaintiffs.

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The VICE-CHANCELLOR said, that the right to sustain a suit of interpleader was founded, not upon the consideration that the plaintiff might be subjected to a double liability, but on his being threatened with double vexation; and he ordered the motion to stand over, with leave for the defendants, Littledale & Co., to serve the other defendants, the Parsee merchants, with notice of the motion.

* * * * *

The motion to dissolve the injunction was again brought forward. The answer of the Parsee merchants was not filed, but an offer on their behalf had been made to the plaintiffs, to put in the answer immediately, if they would accept it without oath or signature. This offer had been referred by the plaintiffs to the defendants, Littledale & Co., who had refused to interfere *in the conduct of the cause, and had left the plaintiffs to act on their own responsibility.

Nov. 25.
Dec. 2.

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[*62]

The *Solicitor-General*, for the defendants Littledale & Co., pressed the motion for the dissolution of the injunction.

Mr. Wood, for the plaintiffs, resisted it; and stated that the plaintiffs intended to proceed forthwith to take the bill *pro confesso*.

Mr. Lewis, for the defendants the Parsee merchants, declined to argue the question with respect to the injunction, and asked for their costs of the motion.

THE VICE-CHANCELLOR :

It has never (according to my recollection) occurred to me to have to consider what is the strict practice in cases of interpleader, raising the question which arises here. The course of proceeding, in practice, as far as my experience goes, has always been for the parties, defendants in interpleader, to come in upon motion and state their respective cases, (with or without affidavits, according to circumstances,) and to obtain the opinion of the Court, in that

(1) 13 B. R. 126 (2 V. & B. 407).

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early stage of the cause, as to the proper mode of trying the question between them; and from the cases in the reports of Vesey & Beames (1), it appears that Lord ELDON's experience did not furnish him with a single instance of a bill of interpleader being brought to a hearing. In this case, *however, one set of defendants, the Parsee merchants, insist upon their right to file their answer, and to have the cause prosecuted against them in the regular way. The question is, what order am I now to make? I assume, for the present purpose, that the plaintiffs are entitled to have this case considered *prima facie* as an interpleader suit. That privilege imposes on them the obligation (for this, says Lord ELDON, the plaintiffs undertake) to prosecute the suit with diligence against both defendants. I cannot say they have in this case forfeited their privilege by want of diligence. Messrs. Littledale & Co. retain the power of urging on the other defendants, by acting against the plaintiffs if they do not proceed.

The strictly regular course is, I apprehend, by answer. If any injury shall arise to Littledale & Co. in consequence of the plaintiffs being supposed to do their duty, it is an evil incident to the plaintiffs' privilege in interpleader, to be protected against double vexation, and I cannot avoid it.

I observe, however, that no inconvenience can arise in this case, beyond what has already occurred; for, the answer being due, the bill will be taken *pro confesso*, unless the defendants, the Parsee merchants, obtain further time to file their answer, or other indulgence; and, upon an application for that purpose, they will have to satisfy me that the question between themselves and Littledale & Co. cannot with justice to them be put into an immediate train of investigation.

Dec. 16.

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The *Solicitor-General*, for the defendants Littledale & Co., again moved to dissolve the injunction; *Mr. Wood*, for the plaintiffs, moved, under the general order, to *take the bill *pro confesso* against the Parsee merchants; and *Mr. Lewis*, for the latter defendants, moved for four months' time to answer.

THE VICE-CHANCELLOR:

This case, after repeated adjournments, is now before me upon three motions. First, a motion by Messrs. Littledale & Co. to

(1) *Stevenson v. Anderson*, 13 R. R. 126 (2 V. & B. 407).

dissolve an injunction obtained by the plaintiffs, restraining proceedings in an action brought by Messrs. Littledale & Co. against the plaintiffs. Secondly, a motion by the plaintiffs to take the bill *pro confesso* against the defendants, the Parsee merchants, who, since the middle of October, have been in default for want of an answer. Thirdly, a motion by the Parsee merchants, for four months' further time to answer.

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The case, as regards the proceedings in the suit on the part of the Parsee merchants, is this: they caused an appearance to be entered in the suit on the 17th of July, 1848: they obtained from the Master three months' further time to answer. This time was allowed to run out without any application being made to enlarge the time for filing the answer. On the 30th of October an application was made to the Master for further time, which was refused on the ground that the Master's jurisdiction was gone; and no application for time was made to the Court until the 16th of this month. Before this, the plaintiffs, who are bound to prosecute the suit to a hearing with due diligence, and who have been pressed on by the motion of Messrs. Littledale & Co. to dissolve the injunction, gave their notice of motion to take the bill *pro confesso*, a motion regularly made, and which I consider myself bound to grant, unless the Parsee merchants can entitle themselves upon their motion to *the further time they now ask for filing their answer. The grounds upon which they ask it are—that, since January, 1847, when Littledale & Co. made their claim, they have, in consequence of the imperfect instructions sent from India, been compelled repeatedly to seek further instructions for the answer of the Parsee merchants, and that they did not obtain such instructions as enabled them finally to prepare their answer, until the last week in November, 1847. They say that the answer is now complete, and that they require time only for the purpose of sending it to India to be sworn. In the meantime, they have offered to file it without oath or signature. This departure from regular practice the plaintiffs declined to accede to, without the consent of Littledale & Co., and Littledale & Co. refuse to relieve the plaintiffs from the responsibility of conducting the suit in such a manner as the regular practice of the Court requires,—they seek, in effect, by all lawful means to get rid of the injunction, and are ready to take any advantage which a departure from practice may give them. I do not make this observation disparagingly to them.

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Now, as I said on a former day, it is strictly the right of the Parsee merchants, within the limits of the time allowed by the practice of the Court, to insist that they shall not be called upon to interplead before they have answered; and where a defendant resides at a distance, which makes it impossible that he should file his answer within the time allowed to parties residing within the jurisdiction, I cannot but think he must be entitled to such extended time for filing his answer as the circumstances of the case may require. But he is bound to satisfy the Court, not only that the extended time he asks is necessary at the time he makes his application, but that he could not (using due diligence from the beginning) have avoided the necessity of making it. In *this case the language of the affidavit in support of the application of the Parsee merchants is so general as to render it impossible for me to form any opinion whether they have used due diligence or not; and I must, therefore, consider them as asking an indulgence which they must purchase at a sacrifice of mere form, not trenching upon their own rights in the case.

I should observe, that I consider Littledale & Co. as justified in not agreeing to dispense with the oath of the Parsee merchants; for without that sanction a fictitious case might be suggested upon the record.

With respect to the order now to be made, I have asked to be informed as to the contents of the answer of the Parsee merchants. Their case is founded on the right of stoppage *in transitu*, as against the plaintiffs; and further they say, that if Littledale & Co. have any interest in the cottons in question in the cause, they have also other securities which they are bound in equity to apply in the first instance, so as to leave the cotton, as far as may be, untouched for the use of the Parsee merchants. The answer does not suggest that these securities are sufficient to cover the amount of Littledale's demand. I do not understand how this second point can arise, but I will assume that it does or may arise. This, however, clearly remains—that the primary claims of the co-defendants to the cotton, as against the plaintiffs, are strictly legal questions, and I can do the Parsee merchants no possible injustice by treating their answer as true. What, therefore, I shall do is (the Littledales asking this)—dissolve the injunction so far as relates to the trial, but with a stay of execution—the Parsee merchants to defend in the name of plaintiffs, indemnifying them—and give the defendants, the Parsee merchants, the time they ask

to file their answer, in order *that they may have an opportunity, if so advised, of putting their equitable case upon the record. If the answer now produced were on the file, I should certainly direct the trial of the legal question in the first instance.

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INGRAM v. THORP (1).

(7 Hare, 67—78.)

A. undertook to advance a sum of money to meet certain outstanding bills accepted for the accommodation of B. upon an agreement by C. to charge certain property with the repayment to A. of 1,500*l.* thus advanced. C. untruly represented that the 1,500*l.* would be amply secured by the property thus charged, and he did not disclose the fact that the property was already heavily incumbered :

Held, that C. was personally responsible for the repayment to A. of the 1,500*l.*

1847.
Jan. 19, 20.
1848.
March 19, 20,
22.
WIGRAM,
V.-C.
[*67]

HENRY AND THOMAS WILSON, who had been partners, as drapers and warehousemen, at Liverpool, dissolved their partnership in October, 1835, and thenceforward the business was carried on by Thomas Wilson and William, his son, under the name of Wilson & Son. The plaintiff, Ingram, a woollen-worsted manufacturer at Halifax, had supplied Henry and Thomas Wilson, and afterwards Wilson & Son, with worsted goods, and he also drew, accepted or indorsed several bills of exchange for the accommodation of the latter firm. In July, 1839, Wilson & Son having omitted to provide for some of the bills when they became due, Ingram made inquiries of Henry Wilson as to the solvency of the firm of Wilson & Son ; and Henry Wilson assured him that the firm was solvent. Others of the bills, to the amount of 800*l.*, having been dishonoured in August, 1839, the plaintiff again informed Henry Wilson of the fact, who repeated his assurance of the solvency of Wilson & Son, and advanced the 800*l.* to take up the bills. A few *days after this, on the 23rd of August, 1839, Ingram, Henry Wilson, and Thomas Wilson, met by appointment at Henry Wilson's house. At this meeting, in order to provide for the bills, upon which Ingram was still liable, amounting to 3,500*l.*, Henry Wilson, Thomas Wilson, and Ingram, entered into an agreement, that Ingram and Thomas Wilson should each deposit half that sum in the hands of a third person, and that Ingram should be indemnified from loss, to the extent of 1,500*l.*, by Henry Wilson, who should give Thomas Wilson an authority to sell certain property in Duke Street, Liverpool,

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(1) *Peck v. Gurney* (1873) L. R. 6 H. L. at p. 393, 43 L. J. Ch. 19.

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r.
THORP.

belonging to Henry Wilson, and pay that sum to Ingram out of the proceeds of such sale. Henry Wilson stated to Ingram, at this interview, that the property referred to was his own, and amply sufficient to secure the 1,500*l.*, or, (as the witnesses said,) three or four times, or several times over that amount, and was entirely unincumbered, or, if not, that it was only charged with the payment of a small annuity. The statement was alleged to have been made in the presence of Thomas Wilson. Henry Wilson, at the same time, gave Thomas Wilson a written authority to sell the premises before the 1st of November then following, and to pay out of the proceeds a sum not exceeding 1,500*l.* to Ingram, provided he should have advanced his share of the monies required to meet the bills; and this letter Thomas Wilson, in pursuance of the same arrangement, delivered to Ingram, inclosed in another addressed to him, in which Thomas Wilson stated, that, by the authority thereby given he was enable to sell the Duke Street property, and pay Ingram 1,500*l.* out of the proceeds, if he should be called upon to provide for the bills then running. Ingram was accompanied, on this occasion, by two sons. One of Ingram's sons, who was a solicitor, remarked, that a more formal security should be given than that which was created by the letters *from Henry to Thomas Wilson, and from Thomas Wilson to Ingram; whereupon Henry Wilson observed, that he and Ingram were old friends, and men of honour, and it was useless to allow their arrangements to be disturbed by young attornies, as his word was as good as his bond; to which Ingram assented. At the same meeting, Henry Wilson repeated his assurances to Ingram, that the firm of Wilson & Son was perfectly solvent, and able to pay all the claims against them in full, if their affairs were then wound up.

[*69]

The firm of Wilson & Son provided 500*l.* only to meet the outstanding bills, and Ingram was compelled to take up the remainder when they became due.

On the 2nd of December, 1839, Wilson & Son became bankrupt. Ingram proved against their estate in respect of the bills, and obtained a dividend of 1*s.* 0½*d.* in the pound.

It subsequently appeared that the Duke Street property was charged with an annuity of 150*l.* for the life of the grantee of the annuity, and also with a second incumbrance for 2,500*l.* and interest, and that it fell far short of a sufficient security for the 1,500*l.*

Henry Wilson died in 1840, having devised his real estate to

trustees for sale, and charged the same, together with his personal estate, with the payment of his debts.

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THORP.

A creditors' bill was filed on the 22nd of August, 1845, by Ingram, against the executors and devisees of Henry Wilson, charging that Ingram had entered into the agreement of the 23rd of August, 1839, upon the faith of the assurances of Henry Wilson as to the solvency *of Wilson & Son, and of the sufficiency of the Duke Street property as a security for the 1,500*l.*: that Henry Wilson knew of the insolvency of Wilson & Son, who were, in August, 1839, indebted to him in upwards of 4,000*l.*; that he also knew that the Duke Street premises were mortgaged very nearly to their full value; and that such representations were made by Henry Wilson, to prevent the plaintiff from taking legal measures against Wilson & Son.

[*70]

The assignees of Wilson & Son were made parties, upon a suggestion that they claimed some interest in the Duke Street property.

The bill prayed that an account might be taken of what was due to the plaintiff in respect of the 1,500*l.*, and that the leasehold premises in Duke Street might be sold, and the proceeds applied, so far as they would extend, in payment of the plaintiff's said demand, and that the deficiency might be paid by the executors and devisees of Henry Wilson, out of his other personal and real estate. The bill also asked for the usual account of debts, and for the application of the estate of the testator in a due course of administration.

The representatives of Henry Wilson by their answer said, they did not doubt, that, in August, 1839, Henry Wilson, as well as all other persons acquainted with the Duke Street property, believed it to be an ample security for the 1,500*l.*, but that, by reason of a subsequent diminution in value, it had become scarcely sufficient to discharge the prior incumbrances thereon. The assignees of Wilson & Son disclaimed.

The allegations of the plaintiff as to the representations made by Henry Wilson, at the meeting of the *23rd of August, 1839, were substantially proved by the depositions of the two sons of the plaintiff, who were present.

[*71]

Thomas Wilson was examined as a witness for the defendants, and stated that no representation was made in his presence, or to his knowledge, by Henry Wilson, that the Duke Street property was unincumbered, or only charged with a small annuity. He stated that the property had cost 5,200*l.*; that Henry Wilson had always considered it to be worth that sum; that, about a month after

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August, 1839, it had been valued by surveyors at 4,800*l.*; and that, since that time, the premises had fallen very greatly in value.

Mr. Romilly and *Mr. Elmsley*, for the plaintiff, relied upon the proofs of the fact that the false representation had been made by the testator; that he must have known the representation was false, or, if not, that he made himself answerable for its truth (1); and that the plaintiff, having taken up the bills upon the faith of the representation, had received damage thereby: *Pasley v. Freeman* (2), *Burrowes v. Lock* (3), *Dobell v. Stevens* (4).

Mr. Bacon and *Mr. Lloyd*, for the defendants, the representatives of Henry Wilson:

[*72]

As to the alleged representation of the solvency of the firm of Wilson & Son, there is no evidence that it was not perfectly true. The fact that the house was hurried to a bankruptcy, and that the *assets failed to realise but a small dividend, does not negative the fact of the solvency of the house at the time the representation was made. The other representation imputed to the testator rests upon slight evidence—the recollection of conversations many years before, by parties under, at least, a bias to attribute to them the effect which the bill alleges. The testator appears, moreover, to have had reasonable grounds for believing that the property was not then an insufficient security for the 1,500*l.*; and, whether it was sufficient or not, there is no proof of any damage to the plaintiff. He was liable to pay the bills before the security was given; he did not incur any new liability in reliance upon the charge, but merely fulfilled a prior obligation. The security was in fact perfectly gratuitous on the part of the testator, and, as it would seem, was given in consideration only of the friendship and connection in business which had long subsisted between the plaintiff and the testator, and perhaps also from the consideration that it was through the testator that the plaintiff had become acquainted with the firm.

THE VICE-CHANCELLOR:

According to the agreement between the parties, I have no doubt that the plaintiff is entitled to have the property sold to pay him the 1,500*l.*, if he has advanced it; and that he has in fact advanced it

(1) *Schneider v. Heath*, 14 R. R. 825
(3 Camp. 506), per MANSFIELD, Ch. J.
(2) 1 R. R. 634 (3 T. R. 51).

(3) 8 R. R. 33 (10 Ves. 470).
(4) 27 R. R. 441 (3 B. & C. 623).

does not appear to be a question. No inquiry is asked by *Mr. Bacon* upon that point. It will be in the common course to decree the sale of the property, subject to the incumbrances, if the incumbrancers will not join, and free from the incumbrances, if they do.

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It is then insisted, that if the property should be insufficient to realise the 1,500*l.*, the plaintiff is entitled *to proceed for the remainder against the general estate of the surety, on the ground of the fraud complained of by the bill. This does not necessarily follow. The question is, not what the property will realise now, but what it was worth at the time the representation was made.

[*73]

The representations which constitute the alleged fraud relate to two distinct facts: first, as to the solvency of the firm of Wilson & Son; and, secondly, as to the value of the property offered for the mortgage. There is no question that Wilson & Son was an embarrassed firm, for it was their embarrassment that led to this arrangement. If the representation amounted to no more than this, that, looking to the accounts of the firm, the firm was solvent, I must take the meaning of that representation to have been, that, although the firm was so embarrassed that they could not then meet their engagements, yet if they could realise their assets, and time was given them for that purpose, the amount of the assets would be found to exceed the amount of liabilities. Now I have no evidence before me of the state of the firm at the time of the alleged representation, nor of what it might have been if given, or other possible, circumstances had occurred. I cannot, therefore, decide that there was any misrepresentation as to the solvency of the firm.

The misrepresentation with respect to the property the subject of the mortgage, as alleged by the bill, is, that there was no incumbrance upon it except an annuity, and that the property was more than sufficient in value to pay the debt. The sufficiency may or may not be matter of opinion; but I do not concur in the observation, that, because value is matter of opinion, therefore a man who says his property is sufficient to pay a debt may not be shown to have made a fraudulent representation. It may be so plainly deficient as to *make it impossible for the party to have believed what he stated. It appears that the property was about this time valued at 4,800*l.*, and that it had cost the owner 5,200*l.*; and if there were no incumbrances upon it, the representation of its value to a person about to advance upon it no more than 1,500*l.* might have been perfectly honest. The only misrepresentation

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which can be imputed, was that regarding the existence of the incumbrances. The allegation in the bill is, that the property was subject to no incumbrances except an annuity of 150*l.*, when in point of fact there was at that time, and of course within the knowledge of the party who made the representation, if he did make it, not only the annuity, but a mortgage of 2,500*l.*—a charge which would render the security insufficient for payment of the debt. It appears to me that the plaintiff must be entitled to say to the owner of the property, if I pay 1,500*l.* upon a representation falsely made by you, that the estate you gave as a security for it is worth 2,500*l.* more than it was in truth worth, you shall make good your representation out of the property, so far as it will extend; and if it shall be insufficient, then out of your other assets. This appears to me to be a clear head of equity. (His Honour then examined the weight and effect of the evidence in the cause, as to the conversation at the meeting of the 23rd of August.)

I have no distinct evidence as to the value of the property at the time, but some evidence is given that the property has fallen in value since this transaction took place. I cannot, in this state of the case, make an absolute decree in the plaintiff's favour. It is equally clear, upon the evidence before me, that I cannot say the plaintiff has not made out a case for relief.

[*75]

Let there be a decree for a sale of the property, and *the Master to ascertain the value of the surplus after paying the incumbrances. If the property be not sufficient to pay the plaintiff's debt, the Master must ascertain what, at the time of the agreement in August, 1839, was the value of the property, and what was the amount of the incumbrances upon it. I direct the inquiry without prejudice, and the Master must be at liberty to state special circumstances.

When the cause comes back, if I am not able satisfactorily to weigh the credit due to Thomas Wilson on the one side, and the two sons of the plaintiff on the other, I must do that which this Court is sometimes obliged to do,—direct the parties to be examined before a jury. I hope that I may be able to escape from that necessity.

1848.
March 19.

The cause was heard upon further directions. The substance of the Master's report is stated in the judgment.

Mr. Romilly and Mr. Elmsley, for the plaintiff.

Mr. Bacon and Mr. Lloyd, for the defendants.

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THE VICE-CHANCELLOR :

The two letters of the 23rd of August, 1839, would clearly give the plaintiff a lien on the Duke Street property to the extent of 1,500*l.*, bills to that amount being paid by plaintiff at maturity. The agreement contained in the two letters of the 28rd of August, 1839, is the only agreement this Court can enforce. But if the plaintiff was induced to enter into that contract by a collateral representation which was false, and known by Henry *Wilson to be false, (as, if it were false, it must have been,) I cannot entertain a doubt that Henry Wilson thereby became liable to the plaintiff for any damages he might sustain by that representation: *Lysney v. Selby* (1), *Dorell v. Stevens* (2), *Evans v. Bicknell* (3), *Burrowes v. Lock* (4), *Partridge v. Usborne* (5), and the cases cited in *Blair v. Bromley* (6). If the damages thus sustained were unliquidated in amount, a jury might possibly be necessary to ascertain the amount; but here the amount is ascertained, or capable of being easily ascertained, if the equity be made out.

[*76]

The circumstance that, before the 23rd of August, 1839, the plaintiff had become liable upon the bills against which the security was intended to protect him, may be material in considering whether the alleged representations were made or not, for an actual creditor may be glad to get what security he can. The creditor who is about to advance his monies will naturally look with greater caution to the security he takes. But if the misrepresentations (as facts) are proved, no question can arise as to the sufficiency of the consideration to support the mortgage. The creditor who is secured rests upon his security, and foregoes those extreme remedies against his debtor to which, without security, the due protection of his own interests might drive him; and if the misrepresentations are established, they will give the plaintiff the same equity against the party who made them, as if the advance was made at the time.

I have briefly noticed the foregoing points, because they were much commented upon at the Bar; but in *truth these points were all disposed of by the judgment I pronounced at the hearing of the cause in January, 1847. I then decided, that the plaintiff was

[*77]

(1) 2 *Ld. Ray.* 1118.

(2) 27 *R. R.* 441 (3 *B. & C.* 623).

(3) 5 *R. R.* 245 (6 *Ves.* 174).

(4) 8 *R. R.* 33 (10 *Ves.* 470).

(5) 5 *Russ.* 195.

(6) 71 *R. R.* 213 (5 *Hare*, 542).

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THORP.

entitled to relief under two conditions: First, that the misrepresentations were established; and, secondly, that damage and injury had resulted from them to the plaintiff. I reserved to myself the question, whether I should send the case to a jury; but in other respects I decided the whole case, so far as the expression of my opinion could do so.

The decree directs a sale, and that the incumbrances shall be ascertained; and if the surplus proceeds, after payment of the prior incumbrances, shall not amount to 1,500*l.*, then the Master is to make inquiries as to the state of the incumbrances on the 23rd August, 1839. If (as the defendants have argued) the plaintiff took the security for what it was worth, these latter inquiries would have been nugatory. But, by the terms of the decree, the inquiries were to be without prejudice, and I could not, therefore, refuse to hear the argument for the defendant repeated.

I directed the inquiries contained in the decree, in order that I might be informed what were the incumbrances and their amount, for that would go directly to the question of misrepresentation. I desired also to know the value of the property in August, 1839; because, as I before observed, although value might in some sense be a matter of opinion, yet the disproportion between the alleged and actual value might be such as to make fraudulent a merely general representation as to the sufficiency of the proposed security.

[*78]

The Master has made his report, and the short result of that report may be stated in a few words. Assuming the annual value to have been 800*l.*, (in fact the property *was let at a much less sum,) the gross value was 4,800*l.* The incumbrances were, the annuity of 150*l.*, or 1,740*l.*, and the mortgage for 2,500*l.*, making together 4,240*l.* This would leave a value of 560*l.* beyond the incumbrances. If the rental were less, it would of course be reduced in proportion. In no view of the case could it be an adequate security for 1,500*l.*, subject to existing incumbrances, and much less could it be worth three or four times the amount of the sum to be secured in favour of the plaintiff. If Henry Wilson said it was unincumbered, except the annuity, that was a fraud; and if he did not say that, but said only that it was a sufficient security, or that it was worth three or four times as much as the 1,500*l.* as a security, it is difficult to say that such a representation could have been other than fraudulent.

(His Honour then went through the pleadings and evidence, and

concluded that the case made by the bill, of misrepresentation concerning the value of the property, was proved.)

Some observations were made on the delay in filing the bill, as a circumstance that discredited the plaintiff's case. I cannot so consider it. If the mortgage itself were in question, or if the state of the property, with reference to the incumbrances, was known in the lifetime of Henry Wilson, and unnoticed by the plaintiff, the observations upon the time between 1839 and 1845, when the bill was filed, might be material. But the mortgage not being in dispute, there is nothing in that part of the case to excite suspicion. Henry Wilson died in 1840, and there is no ground for imputing to the plaintiff any knowledge of the state of the title until after his death.

Decree for payment of 1,500*l.*, with interest and costs, not including the costs of the assignees of Wilson & Son.

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v.
THORP.

CHANT *v.* BROWN.

(7 Hare, 79—89.)

1849.
Jan. 12, 13,
15.

WIGRAM,
V.-C.
[79]

Confidential communications made by a party to his attorney or counsel do not cease to be privileged by the fact that the attorney or counsel afterwards becomes interested as devisee of the property, to the title of which such communications related.

Upon exceptions for insufficiency to the answer of a party who had been the attorney in the transactions impeached, and who refused discovery, on the ground of privilege, the Court cannot regard the subsequent consent of the client to the disclosure of the matters inquired after, for the question of sufficiency must be determined as of a time anterior to the exceptions.

EXCEPTIONS to the sufficiency of the answers of Augustus Pulsford Brown and George Brown, had been allowed by the Master, and were now argued upon exceptions to his report. The question was, whether the professional relation in which the defendants had stood, as attorney and counsel to a party in the transaction impeached by the bill, protected from discovery the matters in question, notwithstanding the circumstances that had subsequently taken place, and which had given the defendants, the Browns, or one of them, a beneficial interest in the property in dispute.

By a settlement made in 1805, upon the marriage of Edward Melton and Mary his wife, the husband was (subject to the life estates of himself and his wife) donee of a power of appointment of an estate at Westhill in the county of Devon, amongst the children,

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v.
BROWN.

or such one or more of the children of the marriage as he should think fit, with remainder, in default of appointment, amongst the children equally. There were five children of the marriage, Richard, Mary, Jane, Elizabeth, and Margaretta. Margaretta married the plaintiff, Robert Chant.

Edward Melton, the husband, died in 1834, and Mary the wife in 1847.

[*80]

The bill was filed by Robert Chant and Margaretta his wife, alleging that Mary, one of the daughters, attained her age of twenty-one on the 21st of May, 1828; that, shortly afterwards, Edward Melton, by some deed, duly executed and attested in the manner required by the power in the settlement of 1805, appointed the Westhill estate to Mary, the daughter, *absolutely; and that, by indentures of lease and release of the 12th and 18th of September, 1828, made between Edward Melton and Mary his wife, of the first part, Mary, the daughter, of the second part, John Timewell of the third part, and the defendant, Augustus Pulsford Brown, of the fourth part, and by a fine, the Westhill estate was conveyed to John Timewell in fee, by way of mortgage for securing to him 4,600*l*. The bill alleged that the deeds and fine were executed in pursuance of a scheme of Edward Melton, the donee of the power, to raise money for his own use; and that Timewell was a party to such scheme, or had notice of the intended application of the 4,600*l*.; and that the whole of such sum was accordingly paid to Edward Melton, and applied for his own purposes.

It appeared by the bill and answers, that John Timewell died in March, 1836, having by his will devised his real and residuary personal estate to the defendant George Brown and Francis Timewell, upon trust for the separate use of Mary, the wife of the defendant, Augustus Pulsford Brown, for life, remainder to Augustus Pulsford Brown for life, determinable on his bankruptcy, and otherwise as therein mentioned, remainder to the children of Augustus Pulsford Brown and Mary his wife; and the testator appointed the said Mary Brown, George Brown, and Francis Timewell his executors. There were children of Augustus Pulsford Brown and Mary his wife, but none of such children were parties to the suit; nor was the personal representative of Edward Melton a party.

The bill charged that Timewell, the testator and mortgagee, had notice, before the advance of his money, of a fraudulent exercise of the power of appointment, as thereby alleged; and, as evidence of

such notice, the *bill charged that the defendant, Augustus Pulsford Brown, acted as the solicitor of Timewell, and of Edward Melton, in the treaty for and preparation of the deeds of appointment and mortgage, and in the execution and completion thereof respectively, and thereby acquired a knowledge of the nature of the transaction; and that the same also appeared by an account current between Edward Melton and Augustus Pulsford Brown, in the possession of the latter.

The bill sought to set aside the deed of appointment of May, 1828, and the mortgage-deed of September following, and the effect of the fine in favour of the parties who would, under the settlement of 1805, in default of appointment, be entitled to the Westhill estate.

The defendants, Augustus Pulsford Brown and George Brown, filed separate answers. Augustus Pulsford Brown said, that he was, and continued to be, an attorney and solicitor, and that he acted as the solicitor of Edward Melton in the treaty for and preparation of said deed of appointment; and that George Brown, a barrister-at-law, acted as the counsel of Edward Melton in settling the draft of said deed of appointment. The defendant said, that he, (Augustus Pulsford Brown,) did not act as the solicitor of John Timewell in the treaty for a preparation of said deed of appointment; and that George Brown did not act as the counsel of John Timewell in settling the said draft; and that, to the knowledge or belief of the defendant, John Timewell was not party or privy to the treaty for, or preparation, or making or executing of said deed of appointment, and did not know, and was not in any way informed, that the same had been, or was about to be made or executed, or that there was or had been any treaty for the same. The defendant, Augustus Pulsford Brown, further *said, that he acted as the solicitor of Edward Melton and John Timewell, in the treaty for and preparation of the said indentures of the 12th and 13th of September, 1828, and the mortgage thereby made, and that George Brown acted as counsel of Edward Melton and John Timewell in settling the draft of the said indenture of the 13th of September, 1828; but the defendant said, that he, the defendant, was not consulted by, and did not act as the solicitor of Edward Melton and John Timewell, or either of them, in or about the treaty for or preparation of said indentures of the 12th and 13th of September, 1828, or the mortgage thereby made; nor did George Brown act as the counsel of Edward Melton and John Timewell, or either of them, in settling the draft of the said indenture, until

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some months after the making and executing of said deed of appointment; and that the treaty for, and preparation and making and executing of the said deed of appointment, formed an entirely separate and distinct transaction from the treaty for, and preparation and making and executing of the said indentures of the 12th and 13th of September, 1828; and that the treaty for, and preparation or executing of the said deed of appointment had not any connection with the treaty for or preparation or making or executing of the said indentures; and the defendant said, that all the knowledge and information which he possessed of the purport or effect or contents of the said deed of appointment, or the circumstances under which, or the purposes for which, or by virtue of what power or authority, or under what agreement, or with what view the same was made and executed, or the form or mode of the execution or attestation thereof, or any other matter or thing in any way relating to the said deed of appointment, were acquired by him, the defendant, in the course and by means of his said professional employment as the solicitor of Edward Melton, and not otherwise; *and that all the knowledge and information which he, the defendant, possessed of the purport or effect or contents of the said indentures of the 12th and 13th of September, 1828, or the circumstances under which, or the purposes for which, or under what agreements or agreement, or with what view the same was made and executed, or by whom the money secured thereby was advanced or paid, or how the same was applied, or any other matter or thing in any way relating to the said indentures, were acquired by him, the defendant, in the course and by means of his said professional employment as the solicitor of Edward Melton and John Timewell respectively, and not otherwise; and the defendant submitted he was not bound to set forth, and he refused to set forth, the particulars inquired after by the interrogatories with regard to the purposes for, and the manner in which the appointment of May, 1828, was made to Mary, the daughter. These inquiries formed the subject of ten exceptions.

Mr. Wood and *Mr. Bird*, for the defendants, in support of the exceptions to the report:

The privilege extended to professional confidence was not taken away by any subsequent events. It was emphatically stated by Mr. Justice BULLER, in *Wilson v. Rastall* (1), not to cease "at any

(1) 2 B. R. 515 (4 T. R. 759).

period of time. In such a case, it is not sufficient to say the cause is at an end; the mouth of such a person is shut for ever:” *Carp-mael v. Powis* (1), *Jones v. Pugh* (2). The fact that the party was dead to whom were imputed the acts complained of, did not, therefore, alter the case, or destroy *the privilege which originally existed; nor was it affected by the circumstance that the solicitor had acquired a partial interest in the property to which the dispute related.

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The *Solicitor-General* and *Mr. Dickinson*, for the plaintiffs,
contra:

The true question is, whether *Timewell*, the testator, if he had been himself a defendant to the bill, would have been bound to answer. The charge against *Melton* and *Timewell* is that of contriving and carrying into effect a scheme, whereby *Melton* was enabled to possess himself of money which belonged to his children; thereby committing a fraud on the settlement. It is clear that *Timewell* could not have avoided discovery of the fact, or the extent of his participation in the alleged fraud. Then, the privilege of the attorney being not for his own benefit, but for that of his client, was only co-extensive with the privilege of the client. The difficulty, if any had existed, was moreover entirely removed by the fact that the interest of *Timewell* had become vested in the defendants, the *Browns*, whereby the several characters of solicitor and client were, as it might be said, merged: *Tugwell v. Hooper* (3), *Guppy v. Few* (4). In so far as the interest of *Mary Melton*, the appointee, was concerned, the privilege was waived in this suit, and the solicitor would not be permitted to insist upon it, where the client expressly required the discovery to be made: *Blenkinsopp v. Blenkinsopp* (5).

Mr. Wood, in reply, denied the proposition, that the *privilege which could be or ought to be claimed by the solicitor, and by the client, was the same: *Greenough v. Gaskell* (6), *Desborough v. Rawlins* (7).

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THE VICE-CHANCELLOR:

It is, I understand, admitted that the answers of the defendants do not satisfy the interrogatories in the bill to which the exceptions

(1) 9 Beav. 16; S. C. 65 R. R. 479
(1 Ph. 687).

(2) 65 R. R. 347 (1 Ph. 96).

(3) 76 R. R. 146 (10 Beav. 348).

(4) Hare on Discovery, 168.

(5) 78 R. R. 216 (2 Ph. 601).

(6) 36 R. R. 258 (1 My. & K. 98).

(7) 45 R. R. 320 (3 My. & Cr. 515).

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apply. The two defendants, the Browns, insist they are not bound to answer the questions, for reasons assigned in their respective answers. The Master thought the reasons insufficient in law, and allowed the exceptions, and they came before me upon exceptions to the Master's report, finding the answers insufficient.

It will simplify the case if I confine my observations to the answer of Augustus Pulsford Brown; for it was admitted (after I had intimated my opinion, that, if the case of Augustus Pulsford Brown, solicitor and attorney, was within the privilege insisted upon, that of George Brown, the counsel, must be within the privilege also) that the same judgment must apply to both answers.

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It may be convenient to observe, as narrowing the argument, that there is no exception applicable to the account current, which is mentioned in the bill as a ground for affecting Timewell with notice of the plaintiffs' case; and with respect to the terms in which the privilege is claimed, (being not less strong than those in *Jones v. Pugh* (1)), it was not argued that they did not describe a case of privilege, if the position of the parties *were such as to entitle them to claim it. I may observe, also, that the Browns are not charged with any fraud.

Now, if Edward Melton and John Timewell were living, and the question arose between the plaintiffs on one side and them on the other, I may perhaps say there are interrogatories not answered which they could not have refused to answer. A party liable to give discovery at the suit of another cannot, by communicating the matter of such discovery to his solicitor, for the purpose of getting advice, on the ground of that communication only excuse himself from giving the discovery which otherwise he would have been bound to give. I had occasion fully to consider the distinction between the client and the attorney, in that respect, in *Lord Walsingham v. Goodricke* (2). Here the question is, whether the attorney is bound to give the discovery.

The law upon this point is given with clearness in Mr. Phillips's *Treatise on Evidence*. The mouth of the attorney, with respect to privileged communications, is closed for ever, unless he has the permission of his client (whose privilege it is) to speak; and it is immaterial whether the client be a party in the suit or not. Lord BROUGHAM examines the principle of the rule in *Greenough v. Gaskell* (3). It is a rule founded upon something like necessity.

(1) 65 R. R. 347 (1 Ph. 96).

(3) 36 R. R. 258 (1 My. & K. 98).

(2) 64 R. R. 226 (3 Hare, 123).

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Without it no one would dare ask professional advice; and it is not, perhaps, too much to say of the rule, that, unless the client waives the benefit of it, courts of justice are bound to consider confidential communications (falling within the rule) as if they never had been made.

But it was argued, that, in this case, the parties upon whom the benefit of the privilege had devolved upon *the death of Edward Melton, appeared and waived the privilege. I cannot understand how that argument can apply upon exceptions to the answer. The question upon the exceptions is, not whether the client, after answer, consents to waive his privilege, but whether the answer was sufficient at the time it was filed. Upon a motion for the production of documents scheduled to the answer, an opportunity (of which the LORD CHANCELLOR availed himself in *Blenkinsopp v. Blenkinsopp*) is presented of getting the waiver of the client. But that is inapplicable to an answer, the sufficiency of which must be determined as of a time anterior to the exceptions. I have not now to consider whether the plaintiffs might avail themselves of it by amending their bill.

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If, however, the waiver were applicable to the case, I should be of opinion that there was no such consent in this case as would justify the attorney in disclosing what was originally confidential. The parties upon whom the benefit of the privilege devolved, upon the death of Edward Melton, would, in the first instance, be Mary, the appointee, and those who claim derivatively under the appointment to her, namely, the Timewells, and perhaps the personal representatives of Edward Melton, for I am not prepared to admit, without more information than I now possess, that Edward Melton, as donee of the power which he exercised in favour of Mary, may not have an interest in upholding the appointment, even against the wills of Mary and Timewell. The right of Mary now to give up the benefit of the exclusive appointment to her brother and sisters is not the question. Admitting that Mary might waive the privilege, in respect of her own interest, she cannot, after the mortgage of September, 1828, deprive Timewell, and those who claim under him, of the benefit of the privilege.

But it was said, that Augustus Pulsford Brown having, under Timewell's will, acquired a property in the mortgage, must, upon these exceptions, be considered as owner of the property, and that, as such owner, he could not refuse to answer interrogatories which Timewell himself would have been compellable to answer. I cannot

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bring myself to think that reasoning sound, even if Augustus Pulsford Brown were absolute owner, which he is not. If Timewell had left his property by will to a stranger, the mouth of Augustus Pulsford Brown would have been for ever closed in respect of the privileged communications. Could it then be argued with success, that if that stranger had by will given the property to Augustus Pulsford Brown, or that Augustus Pulsford Brown had purchased it of him, he would have become bound to disclose that which, by the supposition, came to his knowledge under circumstances which made it confidential, and which, but for his own acquisition, he never could have disclosed? I cannot come to that conclusion. The claim of privilege in this case deprives the plaintiffs of no evidence or right they originally had to a discovery from Augustus Pulsford Brown; and if that can be made out, why should the subsequent accident of the property coming to him make him liable to give discovery of matter which came to his knowledge under a privilege, which, in favour of third persons, would be conclusive? But, in this case, Augustus Pulsford Brown is not absolute owner; why, then, is his limited ownership to deprive the owner of the *corpus* of the estate of the privilege?

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It was ingeniously argued, that those who claim under Timewell could not object to discover that which related to the appointment only; for that the answer stated, that Augustus Pulsford Brown was solicitor for Edward Melton, only in the matter of the appointment. *There are two answers to that argument; first, that the plaintiff's case upon his bill—and without proving which, he can get no relief, and for the purpose of proving which, he wants discovery from Augustus Pulsford Brown—is, that the appointment and mortgage were one transaction; and, secondly, that the mortgage of September, 1828, gives Timewell, and those who are entitled through him, an interest in the appointment, and makes their consent as necessary to the disclosure of the confidential communications, as that of Mary, the appointee.

Exceptions to the report allowed.

1849.
Jan. 15, 19.

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V.-C.

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IN THE MATTER OF GAFFEE'S SETTLEMENT.

(7 Hare, 101--106.)

[REVERSED on appeal, as reported in 1 Mac. & G. 541.]

MIDDLETON v. REAY(1).

(7 Hare, 106—108; S. C. 18 L. J. Ch. 153; 13 Jur. 116.)

Upon a reference to the Master to appoint new trustees, in a case where the power of appointment was vested by the author of the trust in a party to the cause, the Master should have regard to the power in selecting the trustees from the persons proposed by that party and by others, but the Master was not bound to approve of the persons nominated by that party in preference to other persons whom he might consider more eligible; and his decision was not open to exception merely because he had not chosen the persons nominated by the party to whom the power was given.

EXCEPTIONS to the Master's report, approving of two persons as new trustees of the estate of B. Middleton, the testator, in the place of one trustee who was dead, and of another who declined to act.

The defendant, the widow of the testator, who, under his will, was entitled to a life interest in the estate, and was also the surviving and continuing trustee, had married the defendant Reay. The plaintiffs were the parties interested in remainder. The will provided, that, in case any of his trustees thereby nominated and appointed, or any future trustee or trustees to be nominated in the place or stead of them or either of them, as thereafter mentioned, should happen to die, or desire to be discharged from or decline or become incapable to act in the trusts thereby in them respectively reposed as aforesaid, before the trusts should be fully executed, *then, and so often as the same should happen, it should and might be lawful to and for the surviving or continuing trustees or trustee, by any deed or deeds, &c., from time to time to nominate, constitute, and appoint any other person or persons to be a trustee or trustees, in the place of the trustee or trustees so dying or desiring to be discharged, or refusing or declining or becoming incapable to act, as aforesaid.

Mr. Kenyon Parker and Mr. Shebbeare argued, that the existence of the suit did not put an end to or suspend the operation of the will, or take away the powers conferred by the testator. The suit only rendered it necessary that those powers should be exercised under the control of the Court. In this case, the Master was bound to select the persons nominated in pursuance

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(1) Under the modern form of decree the power of appointment of new trustees is not superseded as it was in this case: *Re Gadd* (1883) 23 Ch. D.

134, 52 L. J. Ch. 396, 48 L. T. 395; and see *In re Higginbottom* [1892] 3 Ch. 132.—O. A. S.

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REAY. of the power, they being proper persons; and therefore, the Master ought to have selected the persons proposed by Mrs. Reay: *Webb v. Lord Shaftesbury* (1), *Attorney-General v. Clack* (2), *Cafe v. Bent* (3).

The *Solicitor-General*, in support of the report:

The trustee had an opportunity of appointing new trustees before the bill was filed; but not having done so, the appointment was in the Master, by force of the decree. It was not a matter in which any party could be supposed to have an interest other than in obtaining the appointment of fit persons; and the decision of the Master could not now be displaced, except by showing that the persons he had selected were not fit for the office.

[*108] The VICE-CHANCELLOR, after communicating with the Master, said that the surviving trustee might have acted *under the power given by the will, and appointed new trustees before the commencement of the suit; but, instead of doing this, it appeared that several years, from 1842 to 1846, had been allowed to elapse without any such appointment. In the simple case of a power of appointing trustees, confided to a particular person, the Court, on referring it to the Master in a suit for the appointment of new trustees, would probably give a special direction to the Master to approve of fit persons to be nominated by the donee of the power. Such special directions had, however, not been asked for, or had not been made in this case. The cause had been referred to the Master in the usual way. Under such a decree, the power of appointment given by the will to the defendant was, no doubt, a circumstance to be regarded; but it was only one circumstance. It gave the defendant no right to require the appointment of her nominees. The Master, taking that as well as other circumstances into his consideration, had thought proper to approve of the trustees nominated by the other parties. The defendant did not object to the fitness of the trustees so chosen. He could not allow the exception without holding, as an abstract proposition, that under a decree in the common form, directing the Master to approve of trustees, he is not at liberty, in his discretion, to select persons other than those proposed by the party to whom the power of appointment was given. He saw no ground for differing with the Master in the conclusion to which he had come. The Master had given some

(1) 6 R. R. 154 (7 Ves. 480).

(3) 64 R. R. 280 (3 Hare, 245).

(2) 49 R. R. 405 (1 Beav. 467).

reasons for his decision, which deserved attention; but the judgment of the Court was formed independently of those reasons.

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Exception overruled.

BAGSHAW v. THE EASTERN UNION RAILWAY COMPANY.

(7 Hare, 114—133; S. C. 6 Rail. Cas. 152; 18 L. J. Ch. 193; 13 Jur. 602; *affd.* on app. 2 Mac. & G. 389; 2 H. & Tw. 201; 6 Rail. Cas. 169; 19 L. J. Ch. 410; 14 Jur. 491.)

1849.
March 5, 6,
28.

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[AFFIRMED on appeal as reported in 2 Mac. & G. 389.]

EARL GRANVILLE v. M'NEILE.

(7 Hare, 156—158; S. C. 18 L. J. Ch. 164; 13 Jur. 252.)

1849.
March 9, 10
13.

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V.-C.
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A power contained in a settlement of real estate on trust for sale, enabled one of the parties, his executors, administrators, or assigns, on a vacancy to appoint a new trustee. The party so empowered died, having by his will named three executors, one of whom renounced probate; and the vacancy in the trust having occurred, it was held, that the two acting executors had power to appoint the new trustee.

A BILL by the parties beneficially interested under a settlement of real estate, on trust for sale and other purposes, together with parties who had been subsequently *nominated to be new trustees, in the place of deceased trustees, of the same settlement, for a conveyance of the trust property to the new trustees by the defendants, the devisees of the last survivor of the original trustees; or if the Court should be of opinion, that one of the persons so named as a new trustee had not been properly appointed, then that it might be referred to the Master to appoint a trustee.

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The question was, whether a power of appointment given to a deceased person, "his executors, administrators, or assigns," was well executed by the two acting executors appointed by the will of such deceased person, where three executors had been named in his will, and one of them had [renounced probate] (1).

Mr. F. Currey, for the plaintiffs.

Mr. Cairns, for the two acting executors of the deceased donee of the power.

Mr. Stevens, for the devisees of the last survivor of the original trustees, in whom the legal estate was vested.

(1) The original report here by mistake states "declined to act." The judgment is more explicit upon this point.—O. A. S.

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[*Keates v. Burton* (1); *Eaton v. Smith* (2), and other cases were cited.]

THE VICE-CHANCELLOR:

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In this case, by a settlement of the 11th of June, 1833, a power was reserved to George Alexander Fullerton, his executors, administrators or assigns, in events which afterwards happened, to appoint a new trustee in the place of Stone, an original trustee of the 11th of June, 1833. Stone died in 1844, having devised the trust estates, and the same are now vested in the devisees in trust under Stone's will. George Alexander Fullerton is since dead, having made a will and appointed three persons executors. One of those persons has renounced, and the will has been proved by the remaining two. The two acting executors under Fullerton's will have appointed a trustee in the place of Stone. The trustee so appointed, together with the other trustees of the settlement of the 11th of June, 1833, have called upon the devisees in trust under Stone's will, to convey the property to them; and the question is, whether the appointment of trustee by the acting executors of Stone is a good appointment. I have referred to Sir Edward Sugden's Book on Powers, but find nothing there to make me doubt the sufficiency of the appointment. The question in all such cases is whether the confidence is reposed in the individuals named or in the persons who *de facto* fill the given office.

In this case the power to appoint the trustee is not derived under the will of Fullerton, but under the settlement of June, 1833; and I cannot, in such circumstances, hesitate in coming to the conclusion, that the intention of the parties was, that those whom Fullerton trusted to administer his property should also be trusted to exercise the power given to Fullerton in the settlement of June, 1833. Those whom Fullerton trusted were the persons who acted, and not those only whom he named.

WEBSTER v. BRAY (3).

(7 Hare, 159—181.)

1848.
Dec. 11, 12.
1849.
Feb. 9.

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V.-C.

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Two sets of parties having projected a railway on a similar line, agreed to consolidate the project, and appointed as solicitors of the proposed Company, the plaintiff and defendant, whom they had respectively consulted prior to the consolidation. The two solicitors accepted the appointment without making any definite arrangement as to the division of the business,

(1) 9 R. R. 315 (14 Ves. 434).

(2) 50 R. R. 172 (2 Beav. 236).

(3) *Robinson v. Anderson* (1855) 20 Beav. 98, 102; *affd.* 7 D. M. & G. 239.

or of the emoluments of the office, and a much larger portion of the work was done by the defendant than by the plaintiff. In a conversation between them about six months after the appointment, and before the principal part of the business was transacted, the plaintiff stated, as the result of his inquiries into the practice in like cases, that the allowance for office expenses and personal trouble in such limited partnerships between solicitors, was made by each party retaining, besides his expenses and disbursements, from ten to twenty-five per cent. on the amount of the net charges for the business done, and which principle he considered satisfactory; and the defendant, in reply, observed, that there could be no misunderstanding about it between honourable men. Upon a bill by the plaintiff, claiming an account and division of the profits of the business done by the Company, upon the footing of an equal copartnership, and offering to allow twenty-five per cent. upon the work done separately, to the partner who did it,—the COURT, in the circumstances, made a decree accordingly.

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In April, 1845, some of the directors of the Preston and Wyre Railway Company projected a new line, to connect that railway with the manufacturing towns of the West Riding of Yorkshire; and, about the same time, a similar project for connecting the town of Preston with the West Riding was set on foot by some of the directors of the Preston and Longridge Railway Company. The plaintiff, who was a solicitor residing at Manchester, was professionally employed or consulted as solicitor by the Preston and Wyre directors, at Manchester; and the defendant, a solicitor residing at Preston, was in like manner employed or consulted by the Preston and Longridge directors, who chiefly resided in his neighbourhood. The two parties of projectors entered into communication, and agreed to associate themselves together, and apply to Parliament for powers to carry into effect their common object, under the name of the "Fleetwood, Preston, and West Riding Junction Railway Company." They accordingly formed a provisional committee, and held their first formal meeting on the 8th of May, 1845, at which a resolution was passed, "That the solicitors be Joseph Bray, Esq., Preston, John Webster, Esq., Manchester."

A form of appointment was subsequently prepared *for registration, under the stat. 7 & 8 Vict. c. 110, which was as follows.

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"We, promoters of the Fleetwood, Preston and West Riding Junction Railway Company, do hereby appoint Joseph Bray of Preston in the county of Lancaster, gentleman, and John Webster of Manchester in the same county, gentleman, attornies of her Majesty's Court of Queen's Bench, to be solicitors for the promoters of the said Company, for the purposes specified in the 6th section of the Act for the Registration, Incorporation, and Regulation of Joint-stock Companies. Signed, on behalf of the

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promoters of the said Company: T. B. ADDISON, CLEMENT ROYDS, JOHN LAIDLAY, promoters of the said Company. Dated, this 11th day of October, 1845."

To this was subjoined the acceptance of the plaintiff and defendant, in these words:

"We, the undersigned, do hereby accept the office of solicitors for the promoters of the Fleetwood, Preston and West Riding Junction Railway Company, for the purposes specified in the 6th section of the Act for the Registration, Incorporation, and Regulation of Joint-stock Companies.

"Dated, this 11th day of October, 1845.

"JOSEPH BRAY.

"JOHN WEBSTER."

The Parliamentary agents returned the document, with an intimation that the Registrar refused to enter both names, and that the acceptance of the appointment must therefore be signed by one only. Another form of appointment was thereupon signed by the promoters, and the plaintiff, in forwarding it to the defendant, said that he would "defer to him the honour" of signing the acceptance, and the same was signed by the defendant only.

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The professional business of the Company was transacted by the plaintiff and defendant as such solicitors; but the quantity of such business done for the Company by the defendant was much greater than that done by the plaintiff. After the passing of the Act, the directors of the "Fleetwood, Preston, and West Riding Junction Railway Company" removed their offices to Preston. The plaintiff, by a letter dated the 22nd day of August, 1846, resigned his office as a solicitor to the Company; and on the 31st of August, 1846, the defendant was appointed their sole solicitor.

In March, 1847, the plaintiff filed his bill against the defendant, which, after setting forth the circumstances alleged by the plaintiff to have taken place with reference to the appointment, the communication between the plaintiff and the defendant, and the manner in which the duties of the office of solicitor to the Company had been divided or performed, stated that the defendant had, without the knowledge or assent of the plaintiff, made out and delivered bills of costs, and received from the Company monies to a large amount. The bill charged, that, by the effect of the joint appointment of the plaintiff and defendant, as solicitors of the Company, and their acceptance thereof, and acting under the same, or other-

wise, under the circumstances of the case, a partnership or joint interest was constituted between the plaintiff and defendant in the business of solicitors for the Company, during the subsistence of the appointment, for their mutual and equal profit and loss, subject to all just allowances between them, and prayed a declaration of the Court to that effect. The bill also prayed, that an account of the partnership business might be taken, and the defendant be ordered to pay the plaintiff what, if anything, should, upon such account, appear to be due from him, the plaintiff being ready and *willing, and thereby offering, to pay to the defendant, what, if anything, should appear to be due to him thereupon; and that, in taking such account, the defendant might be charged with interest at the rate of 5*l.* per cent. per annum, or at such other rate as to the Court should seem proper, upon the balance found owing from him to the plaintiff, for the period since the settlement which had been come to between the defendant and the Company, and until the actual payment of such balance; or that the defendant might otherwise be charged with interest upon the balance or sum coming from him to the plaintiff for the period during which such balance had been and should be retained; and that the account prayed might either be taken upon the footing of including an allowance to the plaintiff and the defendant respectively, for office expenses and personal trouble in respect of so much of the partnership or joint business as was personally superintended and managed by them individually, or exclusively of any such allowance, as to the Court should seem proper; and if exclusively of such an allowance, then that such an allowance might be calculated by way of a per-centage deduction, of any amount not exceeding 25*l.* per cent., from the total amount of the net charges for the business personally superintended and managed by each partner; or otherwise, that such other allowance might be made as to the Court should seem meet; and if necessary, that it might be referred to the Master to inquire and ascertain what would be a proper allowance to be made to the plaintiff and the defendant respectively, for office expenses and personal trouble; and for a receiver and injunction.

The defendant by his answer denied that there was any joint appointment, or that any partnership was constituted between him and the plaintiff, as solicitors of the Company, or that the proceedings were taken in *their joint names, or upon their joint responsibility, or their joint account; and, on the contrary, he insisted that such of the proceedings as were taken by himself, were

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taken on his own responsibility and account, and such of them as were taken by the plaintiff, were taken upon the plaintiff's responsibility and account, although, in some of the printed papers, the names of both were inserted. The defendant admitted that he had delivered his bill of costs for business done for the Company, amounting to 4,038*l.* 11*s.* 6*d.*, and that he had received 450*l.* in respect of business done by the plaintiff, having indemnified the Company against any demand which the plaintiff might have; that he (the defendant) had also received 769*l.* 16*s.* 4*d.* in respect of the bill of the Parliamentary agents, and 4,669*l.* 8*s.* 2*d.* on account of his own disbursements. He said that the plaintiff had refused to come to any account, except upon the footing of the alleged partnership, although no such partnership ever existed; and the defendant said, that he had frequently offered to pay the said sum of 450*l.* to the plaintiff, or to pay to the plaintiff whatever he was justly entitled to.

Evidence was entered into; and, among the rest, some witnesses were examined upon the custom or practice amongst solicitors as to the allowances made for personal labour in cases of joint business. The evidence, so far as it was considered material, is adverted to in the judgment.

Mr. Rolt and Mr. Little, for the plaintiff.

The Solicitor-General and Mr. Selwyn, for the defendant.

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The case of *M'Gregor v. Bainbrigge* (1), lately before this branch

1848.

May 9, 10,
29.

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[164, n.]

(1) *M'GREGOR v. BAINBRIGGE.*

Issues directed on the questions, whether the solicitors of a Railway Company were partners in the business done by them for the Company; and, if partners, whether in equal shares.

THE projectors of a railway from Kidderminster to Hereford agreed to combine their project with that of the Derbyshire, Staffordshire, and Worcestershire Junction Railway Company. The plaintiff was the solicitor of the former parties, and the defendant of the latter. Under one of the clauses in the agreement for amalgamation, the plaintiff and defendant were appointed joint solicitors to the Company. The plaintiff and defen-

dant transacted the professional business of the Company (how far separately or jointly was disputed), but the larger part of such business was done by the defendant. The Company failed in obtaining Parliamentary powers. The bill alleged, that it was agreed between the plaintiff and defendant, with the sanction of the directors of the amalgamated Company, that the business thereof should be jointly carried on by the plaintiff and defendant, and that they should be interested in all the gains and profits thence arising, in equal shares; and prayed an account of such joint business, and payment to the plaintiff of what should be found due to him, after making to the defendant all just allowances.

The defendant denied the alleged

of the Court, was referred to; the points argued will sufficiently appear in the judgment.

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THE VICE-CHANCELLOR, after stating the appointment of the plaintiff and defendant to be solicitors of the Company, and their acceptance of the appointment:

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—

In the interval between the appointment of the plaintiff and defendant to be joint solicitors, on the 8th of May, 1845, down to the resignation of the plaintiff on the 22nd of August, 1846, the legal business of the *Company was transacted by the plaintiff and defendant; that is, all was transacted by them or one of them, or

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agreement, and said, that the understanding between the plaintiff and himself was that each should be paid for the professional work and labour actually done and performed by each.

matter, the same was to be indorsed on the *postea*.

The jury having found a verdict for the plaintiff upon both issues,

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March 1, 3.
—

The *Solicitor-General* and *Mr. Lench*, for the plaintiff.

Mr. Wood, *Mr. Piggott*, and *Mr. Cowling*, for the defendant, moved for a new trial, on three grounds: first, misdirection; secondly that the verdict was against evidence; and thirdly, that it was obtained by calling a witness named English, who had not been previously heard of, and whose production was a surprise upon the defendant.

Mr. Wood and *Mr. Piggott*, for the defendant.

[The authorities cited included *Farrar v. Bewick*,† *Reid v. Hollinshead*,‡ *Willett v. Blanford*,§ *Peacock v. Peacock*,|| and *Blair v. Bromley*.¶]

The *Solicitor-General* and *Mr. Bramwell*, for the plaintiff, opposed the motion.

[165, n.]

The VICE-CHANCELLOR directed two issues to be tried: first, whether, at the time of the amalgamation of the two Companies, or at any other time, it was agreed between the plaintiff and the defendant, that the business of the amalgamated Company should be carried on by them jointly, as co-partners; secondly, if the jury should find that there was such partnership, whether it was agreed between the said parties that they should be interested in the gains and profits thereof, in equal shares. And it was ordered, that the plaintiff in equity should be the plaintiff at law; and if the jury should find any special

The alleged misdirection was, that the learned Judge had told the jury, that the joint employment of the plaintiff and defendant, as the solicitors of the Company, and their acceptance of the appointment in the terms on which it was conferred, was *prima facie* *evidence that the business was to be done by them for the joint and equal benefit of both.

[*166, n.]

[His Honour held that there was no misdirection. A new trial was directed upon the third ground only.]

† 42 R. R. 820 (1 Moo. & Rob. 527).

‡ 28 R. R. 488 (4 B. & C. 867).

§ 58 R. R. 61 (1 Hare, 253).

|| 10 R. R. 138 (16 Ves. 56).

¶ 71 R. R. 213 (5 Hare, 542; S. C. 2 Ph. 354).

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their or one of their agents. The question in this case is, upon what principle, or in what proportions, the *profits of that business should be divided between the plaintiff and defendant.

The plaintiff insists, that by the effect of the joint appointment of the plaintiff and defendant to be solicitors, and their acceptance of such joint appointment, and their acting under the same, a partnership was constituted between themselves in the business of solicitors to the Company, for their mutual and equal profit and loss during the subsistence of the appointment, subject to all just allowances between them; and the bill prays relief upon this principle, suggesting various modes by way of alternatives, upon which just allowances may be computed, if the Court should be of opinion that any of such modes are proper under the circumstances of the case.

In order to explain, in a general way, upon what the contract between the parties turns, it will be sufficient to say, that, according to the allegations in the bill, (which, for the present purpose, may be considered as admissions), the work actually done by each party was, as between themselves, divided merely according to the convenience of the case; and the meaning of this expression "convenience of the case" is thus explained in the bill:

[*168] "That the more influential and active of the provisional committee of the intended Company, including the chairman and deputy chairman of such committee, were resident in or near Manchester, where the Company's offices were also situate, and where the secretary of the Company resided, and where the committee meetings were held, but that the line of the proposed railway, as before stated, commenced at Preston, and thence passed in an easterly direction in its route *towards Yorkshire; and that, from the local circumstances above mentioned, and from the obvious convenience of the case, it happened that the greater part of the legal business arising out of attendances upon the provisional committee, and the obtaining and registering the signatures of members and their consents to act and to take shares, and other forms for registration, the preparation of the Parliamentary contract, and the subscribers' agreement, and the procuring of the signatures thereto, the getting of the same contract and signatures printed, and the preparation of the notice of application for an Act, and of the draft bill for Parliament, were principally, but not exclusively, superintended and managed by the plaintiff, as the active party; and the greater part of the legal business arising out of the

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preparation of the books of reference, and the service of the notices upon the owners, lessees, and occupiers of lands, and the forwarding of the bill through its several stages in Parliament, were principally, but not exclusively, superintended and managed by the defendant as the active party; however, in all the aforesaid particulars, the plaintiff and defendant acted in communication and co-operation with one another, and in fact the defendant frequently interposed in those departments of the business which were in general under the more immediate superintendence and management of the plaintiff, and the plaintiff in like manner frequently interposed in those departments of the business which were in general under the more immediate superintendence and management of the defendant."

The actual result appears to have been, that the proportion of work done by the parties was by no means equal. Indeed, according to the defendant's allegation, the amount of charge for work done by the plaintiff was not more than one-twentieth of the entire work *done for the Company. The amount of charge for work done by the defendant exceeded (as he alleges) 9,000*l.*, whereas that done by the plaintiff (as the defendant alleges) did not exceed, or did not greatly exceed, 450*l.*

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The defendant's case is this: He says, that, after the association of the two classes of projectors, meetings were held with a view to transact the business of the intended Company; and that, at one of such meetings, the appointment of officers was the subject of consideration; and that his (the defendant's) claims to be solicitor to the Company were fully admitted by all parties present. But that two persons present who acted on behalf of the parties resident at Manchester, forming part of the intended Company, stated, that it was desirable that a solicitor residing in the town of Manchester should also be appointed, whom the persons residing in Manchester could conveniently consult, without the necessity of going to Preston for the purpose. That, therefore, the plaintiff was named as a proper person to be appointed for that purpose. That, on the 8th day of May, 1845, the first regular meeting of the provisional committee of the intended Company was holden at Manchester, and that defendant was proposed as solicitor; that, after some discussion, and Mr. Birley stating it was advisable to have an organ at Manchester with whom the directors resident there might advise, although the legal proceedings and all other steps necessary for the purpose of bringing the intended Company before Parliament must be transacted by a solicitor residing in the town of Preston, the

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resolution appointing the plaintiff and defendant as solicitors was made. The answers set out the different parts of the business done by the plaintiff and defendant respectively, and the manner in which they respectively acted after the above appointment. The *defendant denies that the plaintiff and defendant were joint solicitors of the Company. He always speaks of the appointment of the 8th of May, 1845, as an appointment "in the bill improperly called a joint appointment," and denies that plaintiff and defendant were jointly responsible to the Company for the acts of each other, and insists that each was answerable for his own separate acts only. He denies that there existed any partnership or joint interest in the profits or emoluments of the work done. He says that he has always been ready and willing to pay to the plaintiff such a sum of money as, upon a fair investigation of his bill, should appear to be justly due and owing to him; but that the plaintiff has always insisted upon a right to receive some profit or emolument in respect of business transacted by the defendant alone, and in which the plaintiff took no part; and that the plaintiff has always refused to come to any account with the defendant, except upon the principle of being allowed some such profit or emolument. In another part of the answer the defendant says, that the only obstacle to the settlement and payment of the sum due to the plaintiff has been created by the plaintiff himself, by his claim to be entitled to a share of the business transacted by the defendant, and by his assertion of the existence of a partnership between the plaintiff and the defendant, although no such partnership ever did exist. The same is repeated in substance in the answer to the amended bill.

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The result is, that the defendant, admitting the joint appointment, in form, of himself and the plaintiff, as solicitors to the Company, denies that they were so in fact, or that the appointment had any such effect as the plaintiff would ascribe to it: he insists that each was responsible to the Company for his own acts only; that *there was no common interest between the plaintiff and defendant as partners, or otherwise, in the work done for the Company; and that each is entitled to be paid for such work as he did, and for no other; and these are the questions I have to try.

Now, without saying what are the consequences of it, my opinion is, that, upon the pleadings and evidence in this cause, it must be taken that the plaintiff and defendant, as between themselves on the one hand, and the Company on the other, were the joint

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solicitors of the Company. The manner in which the plaintiff and defendant might distribute the work to be done for the Company, or divide the emoluments between them, may have been a matter of indifference to the Company; but the Company clearly intended to have one agency only, though consisting of two persons, upon whom an undivided responsibility should attach, and to whom the Company should be under a single liability for the expenses to be incurred; and I am equally clear that such, at the outset, was the mutual understanding of the plaintiff and the defendant, although at that time neither probably anticipated the turn which affairs afterwards took. The proposition that such was the position of the plaintiff and defendant, as between themselves on the one side, and the Company on the other, is so prominent throughout the transactions from the time of the joint appointment in May, 1845, to the resignation of the plaintiff in August, 1846, that I cannot think it would be a useful employment of time to attempt a summary of the evidence which proves it. It is prominent in the original resolution of the 8th of May, 1845, and the subsequent written appointment in October, 1845, and in the acceptance of it; in the joint reports of the plaintiff and defendant to the Company, and the resolutions of the Company, founded on those *reports; in those particular letters between the plaintiff and defendant, in which their joint responsibility is mentioned in terms, and in the London agencies; in the defendant's bill against the Company; and, I may add generally, in the correspondence, and other documentary evidence, the important parts of which are stated in the amended bill; the parol evidence confirms it; and, wherever there is a departure, or apparent departure, from this state of things, it is explained by attendant circumstances, which clearly show that the departure, or apparent departure, was irrespective of, and not intended to alter, the position of the plaintiff and defendant, as between themselves on the one side, and the Company on the other. This, however, is not the question I have to decide; and the point is material only as it bears upon the real question before me, namely, the rights and liabilities of the plaintiff and defendant as between each other.

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Upon this point, an argument was much pressed upon me by the defendant's counsel, which, if it should prevail, would at once terminate the suit. It was said that there could be no partnership without contract, and that, in this case, there was not only an absence of allegation in the bill, that a contract for a partnership

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had been come to between the plaintiff and the defendant, but that the bill contained allegations which showed that no such partnership had been agreed to. The allegations which are said to negative the partnership are those relating to the conversations which took place between the plaintiff and the defendant on the 19th of November, 1845, and other allegations relating to the same subject as that conversation. The form of the argument was this: that the bill, after stating the joint appointment of the plaintiff and defendant as solicitors to the Company, their acceptance of that appointment, *and their acting under it, concluded that those circumstances alone constituted a partnership, without alleging any agreement for a partnership between the two, but alleging (as was said) that no agreement had ever been come to between them for sharing the profits as a subject of joint interest. I should greatly regret the necessity of deciding this case upon a ground so narrow and unsatisfactory as this. If the bill had alleged a partnership, and relied upon the joint appointment, the acceptance of, and the acts done under it as evidence of the alleged partnership, there could be no doubt that the plaintiff's case, in point of pleading merely, would have been sufficient. The only question would be, whether the joint appointment and acceptance of, and acts done under it, and other evidence in the cause, proved the alleged partnership. I am satisfied that the argument proceeds upon a refinement which the rules of pleading in this Court do not oblige me to act upon, and that I am justified in reading this bill as if it had been in the form which I have supposed, that is, as having alleged a partnership, or agreement for a partnership, and relied upon the evidence in the cause, as proving the allegation; and I have considered the position of the parties upon that assumption.

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In doing this, I have not been much impressed with the difficulties which it was said by each party would result from adopting the extreme propositions put forward by the other. If two solicitors, situated as the plaintiff and defendant in this cause were in May, 1845, had mutual confidence in each other's skill and integrity, I see nothing irrational in an agreement which supposes each to become responsible to the Company for the skill and integrity of the other; although, as between each other, they may agree that each shall be paid for the work actually done by him, and nothing *more; nor do I see anything irrational in an agreement which supposes, that, as between the plaintiff and defendant, each was to have an interest in the emoluments of, as well as be

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subject to a responsibility for, the work done by the other. All that appears to me to be necessary to make either agreement rational is, that the parties shall have mutually understood each other at the outset, so that neither may have a motive, during the progress of the work, of avoiding or engrossing any part of it, with a view to his personal advantage, at the expense of the other. I proceed, therefore, to consider the case without prejudice from any such consideration, and under a conviction that I shall best consult the interests of the parties by deciding the case with as much strictness as I can. For this purpose I should have been glad to have availed myself of the course pursued by Lord ELDON, in *Peacock v. Peacock* (1), and have ascertained, by means of issues properly framed, whether, as between each other, the plaintiff and defendant were partners in the emoluments of each part of the work done between May, 1845, and August, 1846, and, if so, in what proportions, or upon what terms. Both parties, however, have declined asking for an issue, and have requested me to decide the point; and as my decision will not in such circumstances preclude an appeal, I will state what my conclusion is.

There are certainly grounds for contending, that where A. and B., jointly as between themselves on one side, and a third party on the other, contract with that third party to do work for him, there is an implied contract between the two for a joint interest in the profit of the work, as well as in its responsibility: *Peacock v. Peacock*. And if the work should afterwards *be done jointly, or nothing afterwards occurs to raise an opposite inference, I cannot but think a court of justice would infer a contract between the two for a joint interest, notwithstanding there might be inequality in the labour bestowed by each, or in the advances come under by them for the purposes of the work.

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In this case it seems undisputed, that each has done work, in the labour of which the other did not participate, and that some work (though not to a great extent) has been done jointly. The question upon the whole is, if the joint appointment and joint acceptance (which made the plaintiff and defendant partners, as between them and the Company) do not *primâ facie* afford evidence of a partnership as between themselves, whether, if such be the case, the other evidence in the cause, coupled with that, do not prove it.

The plaintiff in this contest has an advantage over the defendant in point of evidence. The fact that each acted separately in some

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matters furnishes no conclusion that the separate acts were not done on the joint account. The same occurs in every partnership, but as the contract between the two (be that contract what it may) is entire, every joint act of the two, not imperatively called for by the relation in which they stood to the Company, (as for example, their joint reports to the Company) is legitimate evidence in the plaintiff's favour, of some joint interest in all the work as between the plaintiff and defendant, and the letters, in which the joint responsibility of the plaintiff and defendant to the Company is spoken of, are evidence to the same effect. The evidence of this nature in the present case (excluding that which I am about to mention) is not perhaps such as would satisfy me that I have come to the conclusion *which the moral justice of the case requires, however it might justify me, in connection with the joint appointment and joint acceptance, in holding that the plaintiff was, in law at least, entitled to participate in the emoluments of that part of the work, the labour of which was performed by the defendant separately. But the evidence I have just excluded is very material. It is the conversation which took place between the plaintiff and the defendant on the 19th of November, 1845: it is contained in the following charges in the bill, which are admitted by the answer, without any qualification by which its effect is impaired.

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The bill charges, "that from the period of the appointment it was contemplated by the plaintiff and defendant, that the business which might be superintended and managed by one of them, might prove more onerous than the business which would be superintended and managed by the other of them, and that consequently, shortly after the said joint appointment of solicitors, an understanding was come to, as the result of discussion between the plaintiff and the defendant, on the subject, that, before the division of the profits should be made, each party should be entitled, after deducting actual expenses and disbursements, to an allowance for office expenses and personal trouble in respect of so much of the business as should have been personally superintended and managed by him individually, as is usual in limited partnerships of the like nature between solicitors jointly concerned in the procuring of Acts of Parliament for public Companies, but no final agreement was ever come to between the plaintiff and the defendant as to the rate of such allowance; but upon the occasion of the subject being mentioned between the plaintiff and defendant at the interview which

the plaintiff had with the defendant at Preston, on or *about the 19th of November, 1845, the plaintiff stated, as the result of his inquiry into the practice in similar cases, that the allowance for office expenses and personal trouble in this description of limited partnerships between solicitors was made by each party deducting and retaining to himself, besides expenses and disbursements, a per-centage of from 10*l.* to 25*l.* per cent., on and from the total amount of the net charges, for the business transacted and managed in his office, which would be a satisfactory principle or rate of allowance for the plaintiff; and the defendant did not then object to such principle or rate of allowance, but observed, that there could be no misunderstanding about it between honourable men; however, the conversation having been diverted to some other topic, the rate of the allowance was never actually fixed by express agreement, unless the aforesaid conversation, the full benefit and effect of which plaintiff claims and insists on, shall be deemed to have operated to fix the same."

Now, I take that conversation as evidence of the terms (whether or not sufficiently definite for the Court to act upon) on which the parties had acted upon from the beginning, and, for the purpose of determining what those terms were, I use the evidence in the same way as I should have done if the conversation had taken place on the 8th of May, instead of the 19th of November, 1845. Now, if the conversation had taken place on the 8th of May, 1845, and the defendant had then told the plaintiff, as he now tells him, that he knew of no joint appointment, or joint acceptance, or joint responsibility, and that he (the defendant) should insist upon retaining the profits of all the work he should himself do, must I not assume that the plaintiff, in that case, would or might have insisted upon a division of the business different from that which has actually taken *place? And, if that might have been the case, can I allow the defendant to say that he will have all the profit of the work he did? Does not the conversation on the plaintiff's part, amount, in unequivocal terms, to a claim of right to participate in the profits of all the work? And is not the conversation on the part of the defendant, an unequivocal submission to that claim? The defendant may, indeed, say that no honourable man would consider the plaintiff entitled to be paid for work he had not done; but it is impossible to put such a construction upon what the defendant said: it would make his answer to the plaintiff's claim a denial of, and not an assent to it, a construction

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which the answer does not contend for, nor admits of; and what of unfairness is there in the plaintiff now putting forward his present claim? He might have insisted on taking part in all the work, and sharing the emoluments, or he might fairly leave part of the work to the defendant, and take part upon himself, making just allowances on each side. I see no unfairness in this. This evidence confirms the impression made upon my mind by the other evidence I have referred to, that a conclusion in favour of some joint interest between the plaintiff and the defendant in the work done for the Company, between May, 1845, and August, 1846, is that, to which the evidence in the cause requires that I should come.

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But here a serious difficulty arises, namely, how I am to make that certain which the parties have left in uncertainty. I am clear that there is no evidence before me which establishes a practice in such cases, or furnishes a rule, upon which I can judicially rely for supplying that which the parties have omitted. The conclusion to which the evidence would probably have led me, is that to which I should perhaps have come, as a conclusion of law, without the evidence, namely, that *in the absence of previous arrangement between the parties, the remuneration to be paid to either for personal labour exceeding that contributed by the other, must be left to the honour of the other; that where that principle was wanting, a court of justice could not supply it, and that equality in the division of the profits, would be the rule. In support of this, some observations may be found in the judgment of Lord ELDON in *Peacock v. Peacock*. No conclusion, however, could, morally speaking, be more unjust than that which would give the plaintiff a moiety of the profits in this case, without allowing the defendant a per-centage upon the work done by him exclusively. The case upon the bill throughout is, that inequality of labour was contemplated from the beginning, and that it was understood between the plaintiff and the defendant, that, for this inequality, the defendant should be compensated by a per-centage upon the work he did. It is due to the plaintiff, however, to say, that he did not claim at the Bar, an equality of profits, otherwise than subject to just allowances, and that, under the head of such just allowances, he submitted to be charged in the defendant's favour, upon the work done by the defendant on the joint account.

The only remaining questions then are, whether I can judicially

fix the amount of that per-centage, without, or by means of, an inquiry; and if not, what the conclusion must be.

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The conclusion to which (though certainly not without hesitation) I have come is this, that, in the circumstances of this case, if the per-centage cannot be ascertained by inquiry, the inconvenience must fall upon the defendant, who cannot, regard being had to what passed *on the 19th of November, 1845, after the work had been done and the emoluments realised, insist upon excluding the plaintiff from a participation in the profits of any part of the work done by either party between May, 1845, and August, 1846. On the other hand, I consider the plaintiff as having, on the 19th of November, 1845, assented to the allowance of a per-centage of not less than twenty-five per cent.; and I understand him as having submitted at the hearing of the cause, to allow that per-centage for the purposes of the present suit. I might perhaps consider the transaction of the 19th of November, 1845, as evidence that each party assented to a per-centage within the limits mentioned in their conversation. If, however, the defendant thinks he can, by inquiry before the Master, establish a right to a higher per-centage, with reference to that practice which the plaintiff says exists in like cases, and desires such an inquiry, I will give it him.

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Neither party asking the Court to direct any issue in the case: This Court doth declare, that the plaintiff and defendant are jointly and equally interested in the profits and loss of the business transacted by or on account of them, or either of them, as solicitors to "The Fleetwood, Preston, and West Riding Junction Railway Company," in &c., or to the provisional committee, or directors thereof, between and inclusive of the 8th day of May, 1845, and the 22nd day of August, 1846, subject to all just allowances between them; and neither party asking the Court to direct any inquiry as to the amount of per-centage proper to be allowed to each party, as against the other, for work which might have been done by such party separately; and the plaintiff, by his counsel, submitting, that 25*l.* per cent. should be allowed upon each portion of the work done by either party separately, in favour of the party doing such work: It is ordered, that it be referred to the Master of this Court in rotation, to inquire and state to the Court what work was done by the plaintiff and defendant jointly, or by either of them separately, or on their or either of their account, for the *Com-
pany, or the provisional committee, or directors thereof, between

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and inclusive of the 8th day of May, 1845, and the 22nd day of August, 1846, and by whom, or on account of which, such parties respectively, the work was done jointly or separately as aforesaid; and also the amount paid and payable by the Company, or the provisional committee, or directors thereof, in respect of such work. And it is ordered, that the said Master do take an account of the receipts and payments of the plaintiff and defendant respectively in respect of the transaction of the aforesaid business of solicitors to the said Company, or to the provisional committee, or directors thereof, between the periods aforesaid, and of the profits made thereby. It is ordered that the Master do ascertain what balance is due from either of the said parties to the other of them, on the footing of the aforesaid declaration, and of the inquiries and account herein directed; and when such balance became due; and in taking the aforesaid account, and in ascertaining the aforesaid balances, the Master is to make unto the parties respectively all just allowances, and under the head of such just allowances he is to allow to each party for work and labour 25*l.* per cent. upon the charge made against the Company, or the provisional committee, or directors thereof, for each portion of the work which the Master shall find to have been done by or on the account of each party separately, exclusively of the disbursements in relation to such work; and for the better taking of the said account, and discovery of the matters aforesaid, the parties were to produce &c. Liberty to state special circumstances. The 450*l.* to be paid into Court, and invested &c. Further directions and costs reserved. Liberty to apply.

1849.

Feb. 12, 13.
Nov. 23, 24, 26.

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(7 Hare, 185—193; S. C. 19 L. J. Ch. 322; 14 Jur. 686.)

During a treaty for an assignment of a lease, the plaintiff produced the lease to the defendant, and the defendant looked at the lease and the indorsement by which the original lessee had assigned the lease to the plaintiff, and in which it was stated, that the assignment was made with the license of the lessor. The defendant afterwards requested the plaintiff to cause the proposed assignment to be indorsed on the lease *totidem verbis* with the assignment thereon to himself. Upon a bill for specific performance, the defendant denied, by his answer, that he had seen the covenant against assignment without license; but the COURT concluded, upon the circumstances, that the defendant had notice of that covenant.

An agreement signed by A. and B., for the sale by A. and purchase by

(1) *Reeve v. Berridge* (1888) 20 Q. B. D. *In re White and Smith's Contract* [1896] 523, 57 L. J. Q. B. 265, 58 L. T. 836; 1 Ch. 637, 65 L. J. Ch. 481.

B. of the fixtures in a lease at a certain price, and that A. shall execute an assignment of his interest in the house to B., to bear date on a certain day : Held to be a contract by B. to take such assignment when executed ; and B. having inspected the lease, and the assignment to A., and subsequently directed A. to cause an assignment to him, B., to be indorsed *totidem verbis*, it was held that B. was precluded from calling for the lessor's title.

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[THIS was a vendor's bill for specific performance of an agreement to sell leasehold premises.]

The bill stated, that, by an indenture of lease of the 17th of March, 1845, Lord Monteagle and Lady Lucy Standish demised a messuage, numbered 51, in Great Ormonde Street, to Thomas Wakefield, his executors, administrators, and assigns, to hold the same unto the said Thomas Wakefield, his executors and administrators, for the term of fourteen years, from Midsummer then next, subject to the payment of the rents and the performance of the covenants therein reserved and contained ; one of which covenants was, that the said Thomas Wakefield, his executors or administrators, should not at any time, during the continuance of the said term, assign or underlet the same premises without the license of the lessors in writing first had and obtained for that purpose ; and it was agreed, that such license, if obtained, should not extend to any future assignment or demise of the said premises, or be construed as a waiver of the said covenant for restraining or disposing of the said premises, but should from time to time, as and when the same should be given, be limited and *confined to the particular person or persons in such license named ; that, by an indenture of the 25th of January, 1847, indorsed on the lease, Wakefield, with the consent of Lord Monteagle, who had survived Lady Lucy Standish, assigned the messuage for the residue of the term to the plaintiff, his executors, administrators, and assigns, subject to the rent and covenants. And that a memorandum, dated the 29th of November, 1848, was written upon an inventory of fixtures by the defendant, and signed by both parties ; and was as follows :

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“ November 29th, 1848.—Memorandum, that it is agreed between Edwin Smith and Thomas William Capron, that the said Edwin Smith hereby agrees to sell, and the said Thomas William Capron hereby agrees to purchase, at and for the price of 200*l.*, the several articles and things described in the above-written inventory as fixtures or otherwise, and now being in or about the house 51, Great Ormonde Street, in the occupation of the said Edwin Smith, (with the exception of the mahogany porch and screen in the front

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or entrance hall, which the said Edwin Smith is to be at liberty to remove at his own expense, making good any damage to the doors and walls occasioned thereby); and the said Edwin Smith also agrees to execute an assignment of his interest in the said premises to the said Thomas William Capron, such assignment to bear date the 25th day of December next, on which day possession is to be delivered to the said Thomas William Capron; and the said Edwin Smith hereby agrees to pay and discharge the rent, together with all taxes, rates, water-rates, gas-rates, and all other charges whatsoever, which may be or accrue due for the said premises to such 25th day of December."

[*187] The bill averred, that the plaintiff was ready and *willing to perform his part of the agreement, and that the defendant had accepted the plaintiff's title, and was precluded from investigating the same; and it prayed a decree for the specific performance of the agreement.

* * * * *

[189] By the answer of the defendant it was admitted, that on or about the 21st of November, 1848, the plaintiff informed the defendant of the nature of his interest in the leasehold premises, as to the term of years and amount of rent, that the plaintiff produced for his inspection the lease and assignment, and that the defendant looked at the same to ascertain the number of years for which the premises were holden, and the rent; but the defendant said, that he did not observe or know of the covenant against assignment, and, if he had been aware of that covenant, he would not have entered into the treaty. The defendant admitted, that, on the 30th of November, 1848, he wrote to the plaintiff a letter excusing himself from accommodating the plaintiff with a part of the purchase-money immediately, as the latter had requested, and saying that he might depend upon his being prepared at the time mentioned, cautioning the plaintiff at the same time to direct that care should be taken to avoid injury to the walls in removing the furniture, adding in a postscript,—“As the assignment to me can, of course, be by indorsement and in *totidem verbis*, as that to yourself, perhaps you would let your clerk engross it on the deed with a 35s. stamp, and for which I can repay you.” The defendant said he believed that the solicitor of the lessor had stated to the plaintiff, that a license to assign to the defendant or any responsible tenant would be granted as a matter of course.

At the hearing,

Mr. Wood and *Mr. Southgate*, for the plaintiff, contended that the defendant had accepted the title, [and cited *Burroughs v. Oakley* (1)].

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CAPRON.

The Solicitor-General and *Mr. Schomberg*, for the defendant :

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There is no contract on the part of the defendant to take an assignment of the lease. The agreement is for the purchase of the specified articles in the house, and the term as to the assignment is introduced for the defendant's benefit, if he should require it. But if there be a contract to take the assignment, it was the duty of the plaintiff, in order to entitle himself to the decree, to prove that he can obtain a license to assign, and that he has in fact obtained it: *Mason v. Corder* (2), *Lloyd v. Crispe* (3). The defendant has done nothing to deprive him of the benefit of the common inquiry as to title. Even, if objections had been distinctly waived, and it should be afterwards shown that there is some defect in the title unknown to the purchaser, the Court will not decree specific performance: *Warren v. Richardson* (4). In this case the covenant against assignment without license is in a very special form, and was wholly unknown to the defendant, until after the institution of the suit. Not only is such a covenant unusual, but in this case the form of the covenant is uncommon; and the defendant may never be able to get rid of the property: this is an objection to enforcing specific performance.

The VICE-CHANCELLOR held, that the terms of the memorandum amounted to a contract to take an assignment of the lease, and that, under that agreement, the defendant having previously inspected the lease, and become acquainted with its terms and of the plaintiff's interest in the premises, as stated in the answer, could not insist upon proof of the lessor's title.

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Mr. Wood, in reply, upon the point as to the covenant against assignment without licence, cited *Cosser v. Collinge* (5), *Freme v. Wright* (6), *Pope v. Garland* (7); and submitted that the Court could not consider the defendant as having been ignorant of the existence of the covenant, when he entered into the contract.

THE VICE-CHANCELLOR :

This is a bill by the assignee of a lease against a person who is

(1) 19 R. B. 188 (3 Swanst. 159).

(5) 41 R. B. 70 (3 My. & K. 283).

(2) 17 R. B. 427 (7 Taunt. 9).

(6) 20 R. B. 313 (4 Madd. 364).

(3) 14 R. B. 744 (5 Taunt. 249).

(7) 54 R. B. 492 (4 Y. & C. 394).

(4) 34 R. B. 251 (Younge, 1).

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alleged by the plaintiff to have entered into a contract to take an assignment of the lease. The original lease contains a covenant not to assign without the licence of the landlord; and Thomas Wakefield, the original lessee, obtained a licence enabling him to assign the lease to the plaintiff. The assignment, expressed to be made with the consent of the landlord, was indorsed on the lease. The defendant contends, first, that there is no contract; secondly, if there be a contract, that the plaintiff cannot make a good title; and lastly, that the covenant against assignment is a surprise upon him: that he had no notice of it, until the bill was filed, and therefore, that he did not purchase in fact what he supposed himself to be buying. *The two former points I disposed of at the conclusion of the argument for the defendant.

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On the 21st of November, during the treaty between the parties, the plaintiff gave the defendant the original lease, with the assignment indorsed upon it, for his inspection. The defendant then looked at the body of the lease and indorsement. On the 29th of November, an agreement for the sale of the fixtures and assignment of the plaintiff's interest in the premises is prepared and signed by the defendant. The plaintiff had desired that some part of the purchase-money might be at once paid, but this the defendant by a letter of the 30th of November declined, but added "Of course you may depend upon my being prepared at the time mentioned." In a postscript to the same letter, the defendant said, that the terms of the assignment to Smith would be sufficient for that to himself, and requested the plaintiff to have his assignment indorsed *totidem verbis*. After this, the dispute arose, which had no connection with the defence now raised at the Bar.

If this case had come before the learned Judge who decided *Cosser v. Collinge*, there is no doubt of what his decision would have been. There might be hardship, if a case were to be determined upon constructive notice. But in this case Mr. Capron saw the indorsement on the lease, and by that indorsement it appeared that the licence to assign was necessary. It is also admitted that he looked into the body of the lease, and therefore, he had actual notice of its contents, or such part of the contents as he thought it useful or material to read. The presumption would therefore be that he had made himself acquainted with the whole of the instrument. I do not think that I ought to allow this presumption to be rebutted by the averment of the defendant, that *he looked into the other parts of the lease, and did not observe the covenant upon

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which his objection is founded. I may also observe, that this covenant, if not strictly an usual covenant, is at least so common that there can be no hardship in regarding it as no surprise upon the defendant.

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Declare the plaintiff entitled to the specific performance of the agreement. Refer it to the Master to inquire whether he can make a good title, and, on such inquiry, the Master is to consider and treat the title of the lessor as a good title.

PIMM v. INSALL.

(7 Hare, 193—201; *affd.* 1 Mac. & G. 449; 1 H. & Tw. 487; 19 L. J. Ch. 1; 14 Jur. 357.)

[*AFFIRMED* on appeal, as reported in 1 Mac. & G. 449.]

1848.
May 11, 29,
30.
June 16.

WIGRAM,
V.-C.
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CUDDON v. MORLEY.

(7 Hare, 202—207.)

Suit by the lord of a manor against a tenant of lands within the manor, to restrain the defendant from taking stone from lands in his occupation. The defendant by his answer alleged, that it was and had been a common practice in the manor, to remove the stone which laid immediately under the surface, for the benefit of cultivation. At the hearing, the COURT made a decree for a perpetual injunction, the defendant declining to try his right to take the stone in an action at law, to be brought against him by the plaintiff.

1848.
March 22, 23-
April 13.

WIGRAM,
V.-C.
[202]

THE plaintiff, the lord of the manor of Cockfield Hall, in Suffolk, filed his bill in August, 1846, to restrain the defendant Morley, the occupying tenant of a farm within the manor, from working, hewing, digging, or otherwise raising stone from the quarries or beds of stone on, in, or under the copyhold lands or soil thereof; and from opening or working any new or other quarry, or mine of stone, or other mineral therein; and for an account of the stone already worked by the defendant, and of the profits made thereby; and for payment thereof to the plaintiff.

The defendant by his answer said, that, if the lord of the manor was entitled to the beds of stone under the soil, such right had never been exercised or claimed until the institution of this suit, for a great number of years, during which the defendant had been a tenant of land within the manor, and he believed that no such right existed. The defendant said, that the soil of his farm being very thin, he

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had, with the consent of his landlord, caused the soil in some places to be thrown back, and the stones lying under the surface removed, to the depth of twelve or eighteen inches, and that being done, had caused the soil to be replaced. The defendant said, that the tenants of lands in the manor had been accustomed to do the same, where the nature of the soil was thought to render it advisable, and that he had done so, not for the sake of the value of the stone, but merely for the improvement of the soil. He said, that there were no quarries of stone, in the proper meaning of the term, on the estate occupied by him, and no claim had ever been made by the lord of the *manor to the stone raised in such process of cultivation; and he submitted, that his landlord, the owner of the copyhold estate, was entitled to the stone thereon. The defendant set forth an account of the monies received by him for the sale of the stone, which, in 1844, amounted to 12*l.* 15*s.* 5*d.*, and in 1845, to 10*l.* 7*s.* 9*d.*, making in the whole 23*l.* 3*s.* 2*d.*

The plaintiff amended his bill, after the answer, by adding, as defendants, the owners of the copyhold farm occupied by the defendant Morley. One of such owners appeared at the hearing, and did not dispute the title of the lord to the stone; and the others were proved to be out of the jurisdiction.

The steward of the manor by his evidence said, he believed there was no custom for the tenants to take stone. Several witnesses were examined on the part of the defendants, who proved that stone had commonly been taken in the process of cultivation, as in the defendant's case; and that, in such cases, part of the stone had been sometimes used to repair walls and buildings upon the estate, or to repair the roads, and some part had been sold to defray the expenses of raising the same; and the witnesses, who had long known the land, had never heard of the stone having been claimed by the lord.

The *Solicitor-General* and *Mr. Bichner*, for the plaintiff:

• The decree for an injunction is of course. The defendant does not plead a custom: it is true he alleges that the wrong, of which the plaintiff complains, has been frequently committed, but that is not a defence which the plaintiff could put in issue at law. No *legal right was set up. The case is, therefore, one in which the lord has no alternative, but to proceed with the suit. They cited *Dearden v. Evans* (1), and *Gilb. Ten. Wat.* p. 425.

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Mr. Rolt and Mr. Terrell, for the defendant Morley :

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MORLEY.

The suit is unnecessary and oppressive, and will not be sustained by this Court. The plaintiff asserts a legal right, and he might have brought his action at law in the first instance, and obtained a speedy and comparatively inexpensive decision; or he might have moved for the injunction, when the Court would have sent the case for the decision of a court of law, and the expense of going into evidence in this Court would have been avoided. It is a case which ought not to have been brought to a hearing : *Bacon v. Jones* (1). The right of the plaintiff being denied, he ought, before any decree is made, to establish his right at law; and the utmost which the Court can now do, is to retain the bill, giving him liberty to bring his action.

Mr. Archibald Smith, for the owner of the copyhold estate, not claiming any title to the stone, asked for his costs.

THE VICE-CHANCELLOR :

The plaintiff is lord of the manor, and the defendants, except Morley, are copyholders of the manor. Morley is the yearly tenant of the copyholders of a tenement with about twenty-eight acres of land. Morley on two occasions, once in the end of 1843 or the beginning of 1844, and once in December, 1845, removed the top soil from a small quantity of the land in his occupation, * and dug and got from it the stone, lying at about twelve or eighteen inches below the surface, and sold the stone for his own benefit; and this being done, the top soil was replaced. The profit made by Morley, in the first transaction, was 12*l.* 15*s.* 5*d.*, and by the second, 10*l.* 7*s.* 9*d.* The stone does not appear in itself to have been of any value, *quâ* stone, —merely the sub-soil, gravel, or whatever it was; and Morley says he did the acts solely with a view to the better cultivation of the land. He says, that all persons occupying lands in the manor have been accustomed to do the same thing for the same purpose; and that, until the bill in this cause was filed, the lord of the manor had never objected to the same, or claimed a right to the stone gotten. He says, that he had the express authority of his co-defendants, the copyholders, to do the act above mentioned; and that the stone belongs to them, if not to himself. He adds, that he intends and insists upon his right to do the like, if occasion should require. In August, 1846, the bill was filed against Morley, only complaining of

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(1) 48 R. R. 143 (4 My. & Cr. 433).

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the above acts, and praying an account and an injunction. Morley answered, and stated his case in substance, as I have above given it; and by his answer he insisted, that his now co-defendants, the copyholders, were necessary parties to the bill. The bill was amended accordingly, and the copyholders made parties. They do not by their answer support the case which Morley makes under them. Morley's evidence in the cause shows a very extensive practice, at least amongst agricultural occupiers of lands in the manor, to remove the substratum of stone, as a means of better cultivation; but Morley has not supported by any evidence the case of authority from the copyholders, which he insists upon by his answer.

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It cannot be disputed, that the injury complained of *in this case is of a nature which this Court will prevent by an injunction, provided that injury, as distinguished from damage, be established. At the same time, I cannot but regret that the plaintiff should have been advised to resort to a court of equity in a case like this.

The first act complained of must have taken place in the very beginning of the year 1844, if not in the end of the year 1843. The second I will suppose to have taken place at the end of the year 1845. No repetition of the alleged injury was actually threatened; but in August, 1846, apparently because Morley in terms said he had a right to get the stone, if occasion should require, the bill was filed praying an injunction. No injunction, however, was moved for, and the defendant has done nothing since, but awaited the trial of the cause.

I cannot understand why, in such a case, a bill in equity was preferred to an action at law,—a dilatory and expensive proceeding to one which was prompt, and comparatively inexpensive. No Judge has more strenuously asserted the jurisdiction of the Court of Chancery than the LORD CHANCELLOR, but no one has more deprecated the practice of seeking its extraordinary aid in cases in which the rights are purely legal, and in which they might be as effectually protected by proceedings at law, as by a bill in equity. It would be idle to say, that there is anything in this case which made preventive justice,—the *festinum remedium* of an interlocutory injunction—necessary to protect the plaintiff's rights.

These remarks do not at all go to the jurisdiction of the Court. With regard to the case made by the defendant, the practice of taking the stone, the evidence goes a great way to show that it has always been done *in the manor as a means of cultivation. If the defendant Morley should think it worth while to try the case at law, I shall put him to admit the title of the lord of the manor,

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and that he, Morley, is merely tenant from year to year under the copyholder, and I will retain the bill.

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It is quite clear the plaintiff must pay the copyholders their costs, and have them over against Morley. There is no pretence in this case for saying that they authorised him to do the acts complained of; and the answer does not support him in saying that they claimed the right.

[Affirmed by the LORD CHANCELLOR on the 24th November, 1849, but no report of the appeal can be found.]

BEECH v. FORD.

(7 Hare, 208—217.)

1848,
June 2, 27,
30.

WIGGAM,
V.-C.
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The payee of two promissory notes being about to sue the maker, the brother of the maker agreed to pay 200*l.* to the payee, in trust for E., or 6*l.* 10*s.* per quarter, so long as the 200*l.* should be unpaid, so that the notes should be suspended and rendered inoperative so long as the brother continued to pay the 6*l.* 10*s.* a quarter to the payee; and on payment of the 200*l.* all claim on the notes to cease, and the same to be given up. The brother not having paid the 6*l.* 10*s.* to the payee, for two quarters, but having paid these sums to E., the cestui que trust, (as the latter admitted), the payee brought his action upon the notes against the maker:

Held, in error, reversing the judgment of the Queen's Bench, that the agreement could not be pleaded in bar to the action upon the notes, but might be the subject of a cross action.

Held, in equity, that the agreement must be construed as a contract by the brother, to provide for E. the annuity of 25*l.*, or the gross sum of 200*l.*, as a substitute for the two notes, and by the payee that the two notes should thenceforth be only a security for the performance of the contract; and not as an agreement, under which the original right of the payee against the maker would revive on any failure of the quarterly payments by the brother.

That the brother was entitled to the specific performance of the agreement in equity, not on the ground of the circuity of cross actions which the rule of law occasioned, but on the ground that this Court, by modifying its decree, could give to all parties the benefit of the agreement, whilst a court of law, being unable so to modify its judgment, could not give to one party the benefit of the agreement without depriving another party altogether of that benefit.

THE plaintiff, William Beech, was the maker of two promissory notes, one for 140*l.*, and the other for 200*l.*, both dated the 28th of May, 1829, of which the defendant, John Ford, was the payee and holder. John Ford having threatened to sue William Beech upon the notes, Alfred Beech, his brother, interposed, and an agreement was entered into, which was in the following terms:

"I hereby consent to pay Mr. John Ford, in trust for my

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sister Elizabeth Beech, the sum of 200*l.*, for her sole use and benefit, or the sum of 25*l.* per annum, so long as the 200*l.* shall remain unpaid. This sum of 25*l.* yearly is to be paid every quarter, and should two quarters remain in arrear, such arrears will be considered as a violation of the agreement; and this I promise to do as a consideration for money advanced to my brother William Beech on two bills of his acceptance, bearing date May 28th, 1839, to John Ford, so that the bills and interest on them be suspended and rendered inoperative, so long as I continue to pay the said sum of 6*l.* 5*s.* sterling every quarter to Mr. John Ford; but, on the payment of 200*l.* to Mr. Ford at any one time, all further claim pertaining to the said bills on my brother William Beech is to cease, and the said bills are to *be given up by Mr. Ford. Should my sister Elizabeth Beech decease, such sum of 6*l.* 5*s.* per quarter to be still paid to Mr. Ford, to be at his disposal to allow to any member of my family whom he may think proper. The payments to commence from the 25th of December, 1843.

“ALFRED BEECH.”

“January 31st, 1844.

“To this agreement I am a consenting party.

“J. FORD.”

William Beech was privy to this agreement.

Disputes afterwards arose between William and Alfred Beech, and Ford, and on the 19th of August, 1844, Ford commenced an action in the Queen's Bench against William Beech, to recover the sum of 440*l.*

The 440*l.* was made up of principal and interest on the two notes for 140*l.* and 200*l.*, and of a sum of 15*l.* claimed to be due to Ford on another transaction.

The bill was filed in December, 1844, by William and Alfred Beech, against John Ford and Elizabeth Beech, alleging the performance of the agreement on the part of the plaintiff Alfred; and, in particular, that it was arranged between the plaintiffs and Ford, that the sum of 6*l.* 5*s.* per quarter, mentioned in the agreement, should be paid by Alfred Beech to Elizabeth Beech herself, instead of being paid to Ford for her use; and that, between the date of the agreement and the 25th of June, 1844, when the second quarterly sum became payable, Alfred Beech had, in pursuance of the arrangement, paid or caused to be paid to Elizabeth Beech divers sums of money, amounting in the whole to more than the

12l. 10s. The bill prayed a decree for the specific performance of the agreement of the 31st of January, 1844, *and that the sum of money to be paid by Alfred Beech might be secured for the benefit of the defendant Elizabeth Beech; that, if necessary, a trustee might be appointed in the room of Ford; that Ford might be restrained by injunction from proceeding with his action upon the two promissory notes; and that the notes might be delivered up to be cancelled.

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The defendant Ford, by his answer, denied that any arrangement had been made between himself and Alfred Beech for the payment of the quarterly sum by the latter directly to his sister Elizabeth; and on the contrary, the defendant Ford said that he had always stipulated that such payments, which were his bounty to Elizabeth Beech, should be received by himself, and administered or paid to her by himself.

The cause came on for hearing in June, 1847; when it appeared that William Beech, the defendant at law, had obtained a verdict in the action, upon which judgment had been given by the Court of Queen's Bench in his favour; it appeared, also, that the defendant Ford had brought his error to reverse the judgment on the ground that, *non obstante veredicto*, upon the matters in the plea, judgment should have been given for the plaintiff in the action. The cause was directed to stand over, until the decision of the question at law should be known, the plaintiff Alfred Beech to be in the meantime at liberty to pay the defendant Elizabeth Beech 6l. 5s. quarterly, in part satisfaction of the agreement, without prejudice to any question between the parties.

The judgment of the Court of Queen's Bench was afterwards reversed in the Exchequer Chamber. The court of error held that the agreement of the 31st of January, 1844, could not be pleaded in bar to the action *upon the notes; that the right to bring a personal action once existing, and by act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive; and that the construction of the agreement, from the apparent intention of the parties, was not to suspend the right of Ford to recover on the notes, but to entitle Beech to bring a cross action against Ford, in case of the breach of the agreement by the latter (1).

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The cause was again brought on to be heard, in June, 1848, after the reversal of the judgment in *Ford v. Beech*.

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Mr. Rolt and Mr. Amphlett, for the plaintiffs, insisted that the plaintiffs were entitled to the specific performance of the agreement in equity, as involving a trust for the benefit of the defendant Elizabeth Beech. They cited *Gregory v. Williams* (1), and *Tomlinson v. Gill* (2).

Mr. Willcock, for the defendant Ford :

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First, the plaintiffs have no common case, entitling them to a specific performance of the contract. William Beech is not a party to the agreement, and is not bound by it ; and Alfred has no interest in restraining the action against William. The parties to the agreement only are entitled to sue : *Tasker v. Small* (3). Secondly, a suit for this purpose could only be sustained by Elizabeth, the cestui que trust, and then only could it be sustained against the trustee, if there be any breach of trust on his part, or in case he neglected to enforce the agreement for her benefit ; but the trustee is, in fact, adopting the only legal means which he has for enforcing the *agreement ; he is using the notes as a security for the benefit of the cestui que trust, the conditions for the withdrawal of the notes having been broken. Thirdly, before the plaintiffs could raise any question of trust, the 200*l.*, the subject of the trust, must be paid. Until Alfred Beech has paid that sum, there is nothing upon which the trust can operate. Fourthly, as the case at present stands not only without any trust fund provided, but without any suit in which a trust can be administered, the case is entirely at law. The agreement raised a right to a cross action, in case the defendant should commit any breach of the agreement ; but the notes are to be inoperative no longer than Alfred Beech shall pay to Ford 6*l.* 5*s.* a quarter : whether that has been done will be determined by a cross action on the agreement. In *Gregory v. Williams* the relief was given by Sir WILLIAM GRANT, only on the consideration that the remedy at law was very doubtful (4). In this case, the judgment of the court of error amounts to a decision that a cross action can be brought. Fifthly, the Court will not now stay execution in the action ; or, if the execution be restrained, it will only be on the terms of the plaintiffs, or one of them, paying into Court the 200*l.*, with the arrears of the quarterly payments, and paying the costs.

(1) 17 R. R. 136 (3 Mer. 582).

(2) Amb. 330,

(3) 45 R. R. 212 (3 My. & Cr. 63).

(4) 17 R. R. 136 (see 3 Mer. 589).

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The defendant John Ford was the payee and holder of two promissory notes, one for 140*l.*, and the other for 200*l.*, both dated the 28th of May, 1829, made and signed by the plaintiff William Beech, and by him delivered to John Ford. From the circumstances attending the making of those notes, as well as from the terms of the *agreement of the 31st of January, 1844, it appears that John Ford was a person who took great interest in the welfare of the family of the Beeches, and more especially of the defendant Elizabeth Beech. But as these circumstances, (although they explain the relative position of the parties), have not appeared to me to have any legitimate bearing upon the law of this case, I abstain from noticing them in detail. The plaintiff Alfred Beech is a brother, and the defendant Elizabeth Beech is a sister of plaintiff William Beech.

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(His Honour stated the agreement of the 31st of January, 1844, the action, and the suit.)

When the cause first came on for hearing before me, the plaintiffs in equity had obtained a verdict at law, which they considered equivalent to a decision in their favour; the defendant in equity had carried the case to the court of error, and the question before that Court was then pending. It appeared to me, with reference to the state of the proceedings at law, that the whole question might possibly be determined at law, and I directed the cause to stand over. The proceedings at law have since terminated by a judgment of the court of error in favour of the plaintiff at law, reversing the judgment of the Court below. The effect of that judgment, as I understand it, has been to determine that the performance by the plaintiff Alfred Beech of the agreement of the 31st of January, 1844, cannot at law be pleaded in bar to an action by Ford upon the notes, and that Alfred Beech, if damnified by such action, must seek compensation by a cross action. I am now, therefore, to consider the effect of the agreement of the 31st of January, 1844, in this Court.

In stating my view of this case, I am anxious to guard against being supposed to decide, that the mere circuitry *of cross actions is sufficient to give an equity. But I apprehend, that where an agreement is made, the direct substance of which can be had in this Court, it is not necessarily an answer to a bill for the performance of such an agreement, to say that the parties may have compensation in damages, equivalent in value to what this Court can give by its

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decree. A court of law, in this case, cannot give the parties the direct benefit of the agreement, because it cannot give Ford the benefit of his claim against William Beech, without depriving him of it altogether. But if this Court can preserve to all the parties the benefit of the agreement, the case may be proper for its interposition.

The question upon the agreement, (whatever difficulty there may be in answering it), may, I apprehend, be thus stated: Is it to be considered as a new agreement between Alfred Beech and Ford, the substance of which was, that Alfred should, at the instance of Ford, provide for his sister Elizabeth the annuity or gross sum mentioned in the agreement; that such provision should be a substitute for the two notes owing from William Beech to Ford; and that the notes should thenceforth be a security only for the performance of that agreement? or, was the substance of the agreement this, that, if it was not performed by Alfred, with legal exactness, *i.e.* the very day, Ford's original right against William would revive, notwithstanding any number of payments regularly made by Alfred, under the agreement of January, 1844?

If appears to me, that the former is the correct view of the case. The substance of that for which Ford contracted was a benefit to Elizabeth Beech in consideration of his relinquishing his claim against William. The substance of that for which Alfred Beech contracted, was the relief of William from his liability upon the *notes. This being the substance of the agreement of January, 1844, by treating the notes as a security thereafter for the performance of it, I secure to Ford all he contracted for; I relieve Alfred from no liability but that which might attach upon a neglect to make a money payment on the very day on which, by law, it was due, and the agreement is complied with in all respects, by giving to Ford a revival of his rights against William, for the purpose of enforcing the performance by Alfred of his part of the agreement. This a court of law cannot do, as it cannot modify its judgment, as this Court may do. If the notes had been given at the time the agreement was entered into, I cannot doubt that such would have been the construction of the agreement. As the agreement was altogether new, on the part of Alfred, I cannot think that the circumstance of the notes having existed before the agreement, alters the case.

What I take to be the effect of the agreement, by no means proves that Ford was wrong in bringing his action upon the notes. It is obvious, with reference to the effect given to that agreement in the

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court of error, that, in order to secure to Ford the benefit of the agreement given as a security, it might be necessary for him to proceed to judgment upon the notes, though not to execution, except to the extent necessary for enforcing the security, as I have mentioned.

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FORD.

It was objected, that there was a want of consideration for the agreement; and that William was not a party to it, and, therefore, was not entitled to sue. I cannot give any weight to these objections. I have not any doubt of the sufficiency of the consideration; and *although William was not a party to the agreement, it is admitted that it was made with his privity, and he has a distinct interest in seeking that it may be enforced. Alfred might certainly have sustained the bill alone; but it is not necessary now to express any opinion what the result of the objection might have been, if the question of misjoinder had been raised by demurrer. At the hearing of the cause, the Court is not bound to allow the objection, that a party has been made a plaintiff, if there be no difficulty in making a final decree, notwithstanding the misjoinder.

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The costs of the proceedings at law must follow the event. In this Court the defendant Ford has been unsuccessful in the case which he attempted to set up. The defendant did not say that he intended to sue only for the benefit of Elizabeth Beech. He insisted upon his right to sue on the notes, not merely to the extent of enforcing the security, but absolutely, and of being the administrator of his own bounty, so far as he had contracted for a bounty to Elizabeth. In this contention he has failed; and, according to the rule strictly followed by the LORD CHANCELLOR, he must pay the costs.

The defendant Elizabeth Beech, by her counsel admitting payment of the annuity or annual sum of 25*l.*, in the agreement, &c., up to this date, this Court doth order, that the sum of 200*l.*, in the said agreement mentioned, be paid to the said defendant Elizabeth Ann Beech, by the plaintiff Alfred Beech, on or before the 10th day of August next; and thereupon it is ordered, that satisfaction of the judgment in the action at law in the pleadings mentioned, brought by the defendant John Ford against the defendant William Beech, upon or in respect of the two promissory notes in question in this cause, be entered up. And it is ordered, that the defendant John Ford do deliver up the two promissory notes to the plaintiff William Beech to be cancelled. Order for taxation of the costs of the plaintiffs of this suit, and setting off *the same against the sum of

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BEECH
v.
FORD.

50*l.* 15*s.*, the taxed costs of the defendant Ford in the action at law, and for payment of the balance. Liberty to apply.

[Affirmed by the LORD CHANCELLOR, but no report of the appeal can be found.]

1849.
March 3.

WIGRAM,
V.-C.
[217]

DAVENPORT v. DAVENPORT (1).

(7 Hare, 217—224; S. C. 18 L. J. Ch. 163; 13 Jur. 227.)

To the bill of a plaintiff, alleging that, under a settlement thereby stated, he was entitled to an estate, of which the defendant was in possession, and had been so for nineteen years; that the plaintiff had not discovered his title until a very recent period; and that he had since brought an ejectment against the defendant, to recover the premises, which action stood for trial at the next Assizes; and praying an injunction to restrain the defendant from cutting down and selling ornamental and other timber of great value, and thereby occasioning irreparable injury to the estate, which the bill charged that the defendant threatened and intended to do—a demurrer, for want of equity, was allowed.

THE bill stated a deed dated the 30th of December, 1656, whereby certain estates in the county of Chester were limited to the use of Peter Davenport, the settlor, for life, with remainder to his first, second, third, and fourth sons successively in tail male, with remainder to the right heirs of the settlor; and, after averring the death of the settlor, leaving five sons, the possession of the estates in conformity with the limitations in tail, the death of the four elder sons, and the extinction of their male issue upon the decease of one William Davenport without issue, who died in possession of the estates in April, 1829, and that none of the tenants in tail had ever done any act to destroy the estates tail, or defeat the remainders expectant thereon—alleged that the plaintiff was descended from the fifth son of the settlor, and upon the death of William Davenport became entitled to the estates under the ultimate limitation to the right heirs.

The bill alleged, that, upon the death of William Davenport, Sir Salisbury Pryce Humphreys Davenport, by virtue of some pretended title unknown to the plaintiff, entered into possession of the estates, and continued in such possession until his death, in 1845; that, upon his death, the defendant Dame Maria Davenport, his widow, by virtue of some pretended title unknown to the plaintiff, entered into possession of the estates, and had ever since continued in such possession.

(1) This reluctance of the Court of Chancery to interfere with an owner in possession of land is now in great measure overruled by the Judicature

Act, 1873, s. 25 (8), but the case is interesting as showing the reason for the change thus introduced.—O. A. S.

The bill stated, that the plaintiff had not discovered his title to the said estates until within a very recent period ; that, as soon as he discovered the same, he demanded possession, which the defendant had refused to deliver to him ; and that, on the 10th of January, 1849, which was as soon as his circumstances would allow, he commenced an action of ejectment in the Queen's Bench, and caused a declaration in ejectment to be served upon the defendant to recover possession of the said estates, which action of ejectment stood for trial at the next Chester Assizes.

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v.
DAVENPORT.
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The bill alleged that the defendant threatened and intended to cut down and fell the timber and other trees standing on the said lands, and to sell the same and apply the proceeds of such sale to her own use ; and that she had caused timber and other trees to be lotted and marked, and had advertised their sale by auction, at Stockport, on the 14th of February, 1850. The bill alleged that such timber and other trees were of the value of 2,000*l.* and upwards ; that the same were very ornamental ; and that irreparable injury would be done to the estates by their removal.

The bill prayed an injunction to restrain the defendant from cutting down or felling or otherwise injuring any of the timber or other trees then standing on the said estates, and from selling or otherwise disposing of the same ; and that the defendant might be directed to keep an account of all monies received by her for or on account of any timber which she might have felled or sold or otherwise disposed of.

The defendant demurred.

The *Solicitor-General* and *Mr. Hare*, for the demurrer :

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This is the case of an adverse possession of real estate, the defendant and her late husband having been in possession ever since the title of the plaintiff is alleged to have accrued, and the plaintiff not having established his title at law. In such a case there is no instance of the interference of the Court by injunction to restrain the acts of the party in possession. * * *

Mr. Bacon and *Mr. Bagshaw*, for the bill :

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The cases, in which the Court has refused to interfere by injunction to restrain irreparable waste, have all been cases in which the title of the plaintiff has been denied. Lord ELDON, in *Norway v. Rowe* (1), observes, that he does not recollect that the

(1) 12 R. R. 157 (19 Ves. 147).

DAVENPORT ^{v.} DAVENPORT, injunction has been extended to trespass, "where the fact of the plaintiff's title to the property on which it was committed was disputed by the answer." But these authorities have no application to a case like the present, in which the title of the plaintiff is admitted, as it must be taken to be upon demurrer. The case presented to the Court is that of a plaintiff having a legal title to the estate, to recover which he has brought ejectment, and of a defendant availing himself of the time which must elapse before the action can be tried, to cut down and sell the timber upon the estate. It is doubted by the Vice-Chancellor KNIGHT BRUCE, in the case of *Haigh v. Jaggard* (1), whether the Court is of necessity at this day prevented from interfering in favour of a party out of possession, to restrain a party in possession from stripping the estate of its timber, even where the latter swears that his title is just and valid, or that that of his adversary is unjust and invalid; and, if the Court can interfere in such a case, it certainly is not precluded, by the want of possession by the plaintiff, from interfering where there is no denial of his title.

(They also commented on the other authorities which had been cited on behalf of the plaintiff, and distinguished them from the present case.)

[222] THE VICE-CHANCELLOR :

If this question were new, I should have no hesitation in holding, that, upon the facts stated upon the bill, the plaintiff would be entitled to the injunction. In the absence of authority my mind, in cases of actual destruction of property, would be little prepared to admit the distinction between waste and trespass in cases like the present. But the question is, whether the cases of trespass against a party in possession are not cases of a class in which the Court refuses to act, until the right is established at law.

The jurisdiction of the Court in cases of injunction, originally, no doubt, arose in cases of waste, where there was privity between the parties. All the earlier cases are of that description. The Court began afterwards to interfere in cases of trespass; but I believe it will be found that the cases, in which the jurisdiction was exercised in restraining trespass, have been cases of this peculiar description, the party complaining has been in possession of property, and has complained that his possession was wrongfully invaded by some alleged trespasser. The alleged trespasser, on

(1) 70 B. E. 68 (2 Coll. 231).

the other hand, has not admitted the possession of the plaintiff, nor claimed a right to invade such possession as he had, nor intended to do so, as in the case of the underground workings of adjoining mines, and the Court has distinguished these cases from ordinary cases of trespass by saying the alleged wrong doer claimed under colour of title. The cases of Railway Companies taking lands, under the compulsory powers given them by Parliament, are of the same class. Neither party disputes the abstract right of the other to that which he claims. The dispute is, as to the practical application of the law to the facts of the case. It has always appeared to me, the Court was *trying to get out of a technical rule, with a view to the better protection of property.

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 v.
 DAVENPORT.

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I remember a case concerning the property of Lady Bastard, in the West of England, in which some observations on this point were made by the LORD CHANCELLOR in the course of the argument. Persons working mines insisted that, within a particular district, there was a right common to all miners to make drifts through private closes, for the purpose of draining the mines. This right they were about to assert by cutting a trench through some property of Lady Bastard. In that case the LORD CHANCELLOR granted the injunction. But whether these are or are not refinements as to the claim being made under a colour of right, I think no case can be found, in which,—the party out of possession coming to this Court complaining that another party in possession, and insisting upon a title to that possession, is cutting down timber or doing any other act of destruction,—the Court has ever granted an injunction, until the right has been established at law.

The present case, however, would not be determined, if the case rested there; for the bill states, and the demurrer therefore admits, that the plaintiff is the party entitled, and that the defendant, having been in possession for nearly twenty years, claims under a pretended title. I do not, however, understand that the bill asserts that the defendant does not claim a right to the possession. Whether the defendant may or may not be eventually successful in defending the possession, I should have thought that, if such a case could exist, this ought to be one for granting an injunction, inasmuch as there is, for the present purpose, an admission upon the record that the title, whatever the result of the trial may be, is in some *sense a pretended title. But I have the case of *Jones v. Jones* before me, where the question arose upon demurrer, and my difficulty is, that I cannot, in the face of that decision of Sir

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DAVENPORT *v.* WILLIAM GRANT, take upon myself to say that I am not to apply the rule there laid down to this demurrer. I quite agree with Sir WILLIAM GRANT's observations, and with those of the Vice-Chancellor KNIGHT BRUCE. I cannot, however, do otherwise than say, that, if the cases are to be overruled, it must be by the LORD CHANCELLOR.

In the case before Sir William Grant, the plaintiff alleged, that the testator died intestate,—that the plaintiff was his heir-at-law, and as such had become entitled to the estate, and that certain other persons had some paper, which they called a will, not attested so as to pass the real estate. Sir WILLIAM GRANT said, the Court never had done what was there asked; but he adds, that, at least, the party ought to state that he had used due diligence, whereas it appeared that he had waited two years. How long the plaintiff in this case has waited I do not know. He says he had not discovered his title until very recently. What “very recently” may mean, as against a party who has been in possession for nearly twenty years, I do not know.

I cannot help expressing my surprise that the law should be in this state, but I am compelled to allow the demurrer. I must refer the plaintiff to a higher tribunal, if he thinks he can sustain the bill.

1848.
Dec. 14, 15,
1849.
Jan. 12.

WIGRAM,
V.-C.

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SMITH *v.* PALMER.

(7 Hare, 225—230; S. C. 13 Jur. 94.)

The testator, after directing his personal estate to be invested, gave the income of the same and of his real estate to his wife for her life, and directed that after her death his trustees should sell his real estate, “and pay, distribute, and divide” the money thence arising, and the money at interest, and he thereby gave and bequeathed one-third thereof unto his cousin, J. S., “if he should be then living, but if he should be then dead, unto his legal representative or representatives, if more than one, share and share alike.” J. S. died in the lifetime of the testator's widow, leaving a widow and children: Held, that, upon the death of J. S., his widow and children, as the persons who would, in case of intestacy, be entitled to his personal estate, according to the Statute of Distributions, took vested interests in the third of the residue in equal shares, as tenants in common.

WILLIAM FINDLAY, by his will, dated in 1807, devised and bequeathed his real and personal estate to trustees, upon trust to invest the personal estate, and pay the interest thereof, and the rents and profits of his real estate, to his wife for her life, who was to pay thereout an annuity for the lives of two legatees therein named; and upon the death of his wife, he directed his trustees

SMITH
C.
PALMER.

*to sell his real estate, subject to the said annuity, continuing as follows: "And the money from thence arising, and also the money at interest, shall and do pay, distribute, and divide, and I do hereby give and bequeath the same in manner following; (that is to say), one-third part or share thereof unto my cousin, James Strachan, if he shall be then living, but if he shall be then dead, unto his legal representative or representatives, if more than one, share and share alike; one other third part or share thereof unto my cousin, William Shanks, if he shall be then living, but if he shall be then dead, unto his legal representative or representatives, if more than one, share and share alike; and the remaining third part or share thereof unto my cousin Charles Smith, if he shall be then living, but if he shall be then dead, unto his legal representative or representatives, if more than one, share and share alike." And the testator appointed his wife sole executrix of his will.

The testator died in 1808, leaving Nancy his widow, and the said James Strachan, William Shanks, and Charles Smith surviving. James Strachan died intestate in 1810, leaving Mary his widow, and several children *surviving. William Shanks died in 1825, leaving Jane his widow, and several children surviving. Nancy, the widow of the testator (who had afterwards married Thomas Palmer), died in May, 1838, leaving Charles Smith surviving.

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On the construction of the will, three principal questions arose: First, whether the respective administrators of James Strachan and William Shanks took for their own benefit, as the persons described by the words "legal representative or representatives," the shares given to James Strachan and William Shanks respectively.

Secondly, if such respective shares were bequeathed to the next of kin of James Strachan and William Shanks respectively, did the expression mean next of kin, according to the Statute of Distributions, or the nearest of kin in point of consanguinity? And thirdly, whether the words "legal representative or representatives," meant persons living at the death of James Strachan and William Shanks respectively, or persons living at the death of the tenant for life?

The *Solicitor-General* and *Mr. Phillips*, for the plaintiff; and *Mr. Blundell*, *Mr. Dickinson*, *Mr. Walters*, and *Mr. Elderton*, for the several defendants.

[In addition to the cases referred to in the judgment, the cases of *Taglor v. Beverley* (1), *Long v. Blackall* (2), *Corbyn v. French* (3),

(1) 66 R. R. 22 (1 Coll. 108).

(3) 4 R. R. 254 (4 Ves. 418).

(2) 4 R. R. 73 (3 Ves. 486).

SMITH *Tidwell v. Ariel* (1), *Meryon v. Collett* (2), and other cases, were
 v.
 PALMER. referred to.]

[227] THE VICE-CHANCELLOR :

I stated my opinion at the close of the argument to be, and I have no doubt, that the expression "legal representatives," in this will, means next of kin.

I think also that it means next of kin according to the Statute of Distributions. In *Elmsley v. Young* (3), the words were "next of kin," and not as here, "legal representative or representatives:" *Rowland v. Gorsuch* (4), *Cotton v. Cotton* (5), *Booth v. Vicars* (6), and the cases collected 2 Jarman, p. 39; and *Walker v. Lord Camden* (7).

The question, whether next of kin is to be read as next of kin living at the death of the respective legatees, or at the death of the widow, is a question of more difficulty, and I have thought it right carefully to explain the grounds of my judgment upon it.

[*228] First, let it be supposed that the gift had been to James Strachan, *simpliciter*, without the words, "if then living," and without any substitutionary gift, would James Strachan in that case have taken a vested or contingent interest? My opinion clearly is, a vested interest. The whole estate in that case would have been disposed of by way of present gift and simple *remainder, and the interest of James Strachan would have been postponed for the convenience of the estate only, (that is to say), for the sake of those who were to take before him. The only question could have been, whether it was made contingent by the word "then," (referring to the death of the widow), or by the circumstance that the gift to James Strachan was in fact expressed by the words "pay, distribute, and divide." But I think, in such a case, the interest would have vested in James Strachan, at the death of the testator. The word "then" is satisfied by referring it to the time when James Strachan is to become entitled in possession, without supposing that the vesting was intended to be postponed, and where the same subject (in substance) is the subject of successive limitations. I consider it immaterial whether the testator uses the words of remainder, or whether the future gift is expressed in a direction to pay and distribute, as is

(1) 18 R. R. 259 (3 Madd. 403).

(2) 68 R. R. 123 (8 Beav. 386).

(3) 39 R. R. 146 (2 My. & K. 780).

(4) 2 Cox, 187.

(5) 50 R. R. 99 (2 Beav. 67).

(6) 66 R. R. 1 (1 Coll. 6).

(7) 80 R. R. 84 (16 Sim. 329).

explained in *Leeming v. Sherratt* (1), *Holloway v. Clarkson* (2), and *Packham v. Gregory* (3). *Bataford v. Kebbell* (4) is sometimes cited, to show that a future gift, expressed in the terms “pay and distribute,” is contingent by force of the expressions only. That is not so; the judgment proceeded emphatically upon the ground that the subject of the future gift was not the same as, but different from, the previous gift for life. The case of *Vawdry v. Geddes* (5) is also distinguishable for similar reasons. Mr. Jarman’s observations upon those cases deserve attention; and the inconvenience of not holding such gifts vested, in case a legatee might die leaving a family unprovided for, is so great, that in late years they have been rarely held to be contingent.

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v.
PALMER.

However, the will before me (if that be necessary) contains words of present gift. The words of the will are, not only that the trustees shall “pay, distribute, and divide,” but the testator adds, “and I hereby give and bequeath the same, in manner following.” If a substitutionary gift to B. be added in the words of this will, it may be admitted that the interest of B. would be contingent during the joint lives of James Strachan and the widow of the testator. But if James Strachan died, leaving the widow surviving, the gift would become vested, as in the case I first supposed, of a simple gift to James Strachan. In like manner, if, instead of supposing the substituted legatee to be a single individual, several legatees be substituted as tenants in common, they would all take vested interests upon the death of James Strachan, in the lifetime of the widow.

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But it was argued, that, in the case of a gift to a class, the rule is otherwise; and that the Court will read the gift to the class (where the gift is substitutionary) as a contingent gift to such of the class as are living at the period of distribution, namely, the death of the widow. It cannot, I think, be denied, that such a rule of construction would be, in some sense, arbitrary in this case, as not being authorised by the language of the will; still, if the rule exists, I am bound to follow it. It has been said (6), that this construction is hardly reconcilable with analogous cases, and that it must be treated as peculiar to clauses of substitution in favour of children. Upon this, the only cases cited are *Eyre v. Marsden* (7),

(1) 62 R. R. 1 (2 Hare, 14).

(2) 62 R. R. 217 (2 Hare, 521).

(3) 67 R. R. 98 (4 Hare, 396).

(4) 4 R. R. 15 (3 Ves. 362).

(5) 32 R. R. 196 (1 Russ. & My. 203).

(6) Jarman on Wills.

(7) 48 R. R. 73 (2 Keen, 564).

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and *Crowder v. Stone* (1). If *Eyre v. Marsden* be referred to, it will be found that the gift to the children contained a reference to the anterior gift to the parent, which might justify the Court in the conclusion it came *to, supposing it to be a construction the Court felt itself bound to favour. *Crowder v. Stone* (1) raised a different question; but the judgment appears to have proceeded upon what Lord LYNDHURST considered the true construction of the will. I was, however, referred to the later cases of *Bennett v. Merriman* (2), *Booth v. Vicars* (3), and *M'Gregor v. M'Gregor* (4), all cases of "children" substituted for parents, to which special cases it has been considered that the rule is confined. But I cannot think that either of the learned Judges, by whom those cases were decided, recognised any such abstract rule. In *Bennett v. Merriman* Lord LANGDALE said, "With regard to the general rule as to gifts in remainder, there is no doubt. The question is, whether the peculiar wording of this will does not lead to a different construction;" and in the other two cases, the VICE-CHANCELLOR proceeds entirely upon the wording of the will. Having formed a strong opinion, that if the individuals named had been the substituted legatees, under the words "I give and bequeath," and not meaning to express any opinion upon the rule which has been stated as to children, I think the interest of the next of kin vested at the death of James Strachan, and that I should be introducing an arbitrary rule of construction if I held otherwise.

The declaration will be, that, upon the death of James Strachan, the persons who, according to the Statute of Distributions, would be entitled to his personal estate, took vested interests as tenants in common, but in equal shares, in the third of the residue bequeathed to James Strachan and his legal representatives; and the form of the declaration will be similar as to the other third of the residue bequeathed to William Shanks and his legal representatives.

1847.
Dec. 10, 11,
17.

WIGRAM,
V.-C.
[281]

HARVEY v. TOWELL.

(7 Hare, 231—235; S. C. 17 L. J. Ch. 217; 12 Jur. 241.)

Gift of stock in the public funds, upon trust to pay the dividends to the four brothers and two sisters of the testator, in equal shares, for their respective lives, and after their respective deceases, to pay the dividends unto and amongst the eldest sons or son of his said brothers, and the

(1) 27 R. R. 68 (3 Russ. 217).

(2) 63 R. R. 110 (6 Beav. 360).

(3) 66 R. R. 1 (1 Coll. 6).

(4) 70 R. R. 177 (2 Coll. 193).

survivors and survivor of them, for their lives or life, in equal shares and proportions, upon their attaining twenty-one, with a provision for maintenance in the meantime; and after the decease of such eldest sons or son, to pay the said dividends unto and amongst the eldest male issue only for the time being of their bodies, *ad infinitum*, for ever: Held, that the bequests to the brothers and sisters of the testator were valid.

HARVEY
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That the bequests in remainder to the four eldest sons of the four brothers, each of whom had a son living at the death of the testator, were valid; but that the eldest sons took absolute interests in their several shares of the stock.

SAMUEL TOWELL, by his will, dated in 1812, after giving certain annuities and pecuniary legacies, proceeded: "And as to all the rest, residue, and remainder of my estate and effects whatsoever, whether real or personal, which I shall die possessed of and interested in, I give and bequeath the same, and every part thereof, unto my brother Richard Towell: to hold to the said Richard Towell, his heirs, executors, and administrators, for ever, according to the nature and quality thereof respectively; upon the special trust, nevertheless, to pay and apply the interest, dividends, and annual proceeds of the sum of 1,200*l.* 4*l.* per cent. Bank Annuities, and 4,000*l.* 8*l.* per cent. Consols, now standing in my name, subject to the payment of the aforesaid annuities unto and amongst him, the said Richard Towell, and my other brothers, John, George, and William, and my sisters, Susan Wade, widow, and Mary Keeling, in equal shares and proportions, for and during the term of their several and respective natural lives; and from and immediately after their several and respective deceases, then upon trust to pay the same interest, dividends, and annual produce of the said stock unto and amongst the present or any future eldest sons or son only, for the time being, of my said brothers, Richard, John, George, and William, born or to be born, and the survivors *or survivor of them, for and during the term of their natural lives or life, in equal shares and proportions, upon their attaining their age of twenty-one years, such respective shares to be applied, in the meantime, towards their or his maintenance and education; and if but one son only of my said brothers shall be living at the time of my decease, then the whole to such only son, during his natural life, as aforesaid; and from and immediately after the decease of such eldest sons or son, for the time being, and the survivors and survivor of them, as the case may be, then, upon further trust, to pay and apply the interest, dividends, and annual produce of the said stock, unto and amongst the eldest male issue only, for the time being, of their and each and every of their bodies

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or body, *ad infinitum*, for ever, without, in any manner or on any account whatsoever, reducing or disposing of any part or parts of the said capital sums of 1,200*l.* and 4,000*l.*, so by me invested, and now standing in my name, as aforesaid, and to and for no other use, trust, intent, or purpose whatsoever."

Richard Towell, the brother, was the executor and trustee appointed by the will.

By the Master's report it appeared, that the testator died in September, 1812, leaving his said four brothers and two sisters surviving, and that the testator's brothers respectively had eldest or only sons living at the date of the will, and of the death of the testator.

The bill was filed, after the death of all the testator's brothers and sisters, by an incumbrancer on the share of Henry Towell, who was the eldest son of William, one of the brothers of the testator, named in the will.

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The case was argued on the construction of the will, and its effect on the events which had happened, by

Mr. Kenyon Parker, Mr. Romilly, Mr. Rolt, Mr. Chandless, Mr. Elderton, Mr. Rogers, Mr. Craig, Mr. Headlam, Mr. F. J. Wood, and Mr. Pownall, for the different parties in the cause. [*Lyon v. Mitchell* (1), *Skey v. Barnes* (2), *Stonor v. Curwen* (3), *Thomason v. Moses* (4), *Curtis v. Lukin* (5), *Templeman v. Warrington* (6), *Jordan v. Lowe* (7), *Evans v. Jones* (8), and other earlier cases were cited.]

THE VICE-CHANCELLOR:

At the conclusion of the argument in this case, I stated my opinion to be, that the estates to the brothers and sisters of the testator were good, and that the estates in remainder, limited to the eldest sons of the four brothers (each of whom had a son living at the death of the testator), were good also. The question upon which I reserved my judgment was, whether the sons of the testator's brothers,—the testator's nephews,—took life estates only, or absolute interests in the stock in question. If the property,

(1) 16 R. R. 248 (1 Madd. 467).

(2) 17 R. R. 91 (3 Mer. 335).

(3) 35 R. R. 156 (5 Sim. 264).

(4) 59 R. R. 421 (5 Beav. 77).

(5) 59 R. R. 442 (5 Beav. 147).

(6) 60 R. R. 336 (13 Sim. 267).

(7) 63 R. R. 105 (6 Beav. 350).

(8) 70 R. R. 187 (2 Coll. C. C. 516).

which was the subject of the testamentary gift, had been real estate, no serious question would have arisen; for, if the nephews of the testator did not *take estates tail by force of the rule in *Shelley's* case, it is clear that they could have taken such estates by force of the *cy près* doctrine. The result, therefore, if the subject of the gift had been real estate, would have been the same, though it might have depended upon the application of different principles. But the subject of the bequest being personal estate, it became necessary to decide upon which of the two principles above referred to, the decision in the case of real estate would have depended. If upon the rule in *Shelley's* case, the nephews of the testator would have had the benefit of the argument, that the same words of limitation which, in the case of real estate, would give an estate tail, will, in the case of a bequest of personal estate, give an absolute interest. But if the bequest to the issue male of the nephews, in this case, is not to be construed as a limitation to the nephews themselves, the right of the nephews to a larger estate than for their lives, would have depended upon the *cy près* doctrine; and that doctrine being inapplicable to personal estate, the life estate of the nephews would not be enlarged.

The counsel for the nephews argued, that the limitations to their issue male were clearly used by the testator himself, as words of limitation, an argument which (he will pardon me for saying) created the first serious difficulty in my mind upon the case; and, if my decision is to depend upon the correctness of that argument, I have no hesitation in saying, my decision must be against the nephews taking more than a life estate. To say that the limitation to the issue male of the nephew, was used by the testator as words of limitation, is equivalent to saying that it was used by the testator for the purpose of describing the quantity of interest he intended the nephews to take. The effect of such a construction of the testator's words would be, to make *it simply impossible that his will could take effect in favour of the issue of the nephews, in a single instance, differing, in this respect, from the descent of real estate. In the latter case, the decision of the Court gives the issue a chance; in the former, it would destroy it. Moreover, the language of the will is directly opposed to the same construction, for the testator gives an estate to the nephews for their lives only, and in the most express terms gives it to the issue of the nephews, as purchasers. I have, since the argument, read Mr. Jarman's

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observations (1), and (with great advantage) those of Mr. Prior also (2), on the cases to which I was referred, but without being able to come to a conclusion satisfactory to my mind. The argument which has made me conclude in favour of the claim of the nephews to an absolute interest in the personalty, is, the elaborate argument of Mr. Fearne (3), in which he considers the cases to which, in principle, the rule in *Shelley's* case is applicable, and those to which it is not. Lord THURLOW's statement of the rule is this,—that the testator does intend the heirs male to take as purchasers; but he intends, also, that all heirs male should take, and that they should take because they were heirs male, and in that character. I think this case is within the principle deduced by Mr. Fearne.

The costs of the suit must come out of the estate.

CULSHA v. CHEESE.

(7 Hare, 236—247; S. C. 18 L. J. Ch. 269; 13 Jur. 802.)

1849.
Feb. 22.
March 2, 6, 7,
24.
April 4.

WIGRAM,
V.-C.
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Upon the marriage of the testator and the testatrix, certain estates were settled to the use of the husband for life, remainder to the wife for life, remainder to the children of the marriage, and, in default of issue of the marriage, to the use of the survivor of the husband and wife, and his or her heirs and assigns. The testator, by his will, made during the coverture (having other estates not in settlement), devised all his real estates to the testatrix for her life, and, upon her decease, to the use of A., B., and C., in trust for sale, and out of the proceeds of such sale, and the residue of his personal estate, to pay certain legacies, and subject thereto to stand possessed of one-fourth part of the said trust-moneys, for such purposes as the testatrix should appoint, and, in default of appointment, for her next of kin; and to pay and dispose of the other three-fourths equally amongst A., B., and C., their executors, administrators, and assigns. The testator died in the lifetime of the testatrix, leaving no child of the marriage. The testatrix, by her will, made in 1839, after the death of A., B., and C., reciting, that she believed it was the testator's wish that the settled estates should pass by his will, and she was desirous of fulfilling his wishes, devised the settled estates to the uses by the testator's will declared concerning the same, and in exercise of the power of appointment given to her by the testator of the fourth of his estate, appointed the same to her trustees, upon the trusts which she declared of her own residuary estate, and directed her real estate to be sold and fall into such residue, which she bequeathed to several legatees:

Held, that there being, in the events which happened, no uses declared of the settled estates by the will of the testator, the specific devise of such

(1) Treatise on Wills, 1844.

and "child" occur, &c., 1839.

(2) Treatise on the Construction of
Limitations in which the words "issue"

(3) Fearne's Conting. Rem., 7th
ed., 190.

settled estates by the will of the testatrix was void, or incapable of taking effect.

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That the heir-at-law of the testatrix did not take the settled estates as the subject of a void or ineffectual devise; but that, under the Wills Act (7 Will. IV. & 1 Vict. c. 26), the settled estates passed by the residuary devise in the will of the testatrix, for the benefit of her residuary legatees, —the case not being one in which a contrary intention appeared, within the meaning of that statute.

Costs, where two estates, those of the testator and the executor, are administered in the same suit.

By a settlement, made upon the marriage of John Woodhouse and Mary his wife certain estates, in the county of Hereford were settled to the use of John Woodhouse and his assigns, during his life, with remainder to the use of Mary, the wife, for her life, for her jointure and in bar of dower, and after the several deceases of John Woodhouse and Mary his wife, and the decease of the survivor of them, then to the use of the children of the said marriage, as John Woodhouse and Mary his wife should jointly by deed, or the survivor of them should by deed or will appoint, and in default of such appointment to the use of the said children, and, in case there should be no issue of the marriage, or if all such issue should die in the lifetime of the survivor of the husband and wife, then to the use of such survivor, his or her heirs or assigns, for ever.

John Woodhouse, the husband, died in January, 1820, without issue, having by his will, dated in 1816, directed that, after the payment of his debts and certain legacies, the residue of his personal estate should be invested, and the annual produce thereof paid to Mary his wife, for her life; and that, from and after her decease, the same should be held upon the same trusts as were thereafter declared of the monies to arise by the sale of his real estates. And the testator thereby bequeathed legacies to children of Thomas and Althea Jeffries, and children of John and Barbara Fletcher, and to several other persons; and he directed that all such last-mentioned legacies should be paid by his trustees out of the monies thereafter provided for that purpose, at the end of twelve months next after the decease of his wife. And after devising the estates vested in him by way of trust or mortgage, the testator devised all other his manors, messuages, or tenements, farms, lands, hereditaments and premises, and real estate whatsoever and wheresoever, to the use of the said Mary his wife and her assigns, for her life, subject to an annuity to his mother for life, and from and immediately after the decease of his said wife, unto and to the use

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of John Cheese, Thomas Jeffries, and John Fletcher, their heirs and assigns for ever, upon trust to sell the said real estate, and out of the monies to arise from such sale and the residue of his personal estate, to set apart so much as should be sufficient to produce certain annuities, which he thereby directed to be paid to his mother and his brother Richard, for their lives, and in the next place to pay the legacies thereinbefore bequeathed by his will, and directed to be paid at the end of twelve months after the decease of his wife. And after the payment of such annuities and legacies he directed his trustees to stand possessed of the said monies, upon trust to pay, apply, or dispose of one-fourth part *thereof unto such person or persons, in such manner, and for such intents and purposes in all respects, as his wife should by deed or will appoint, give, or bequeath; and in default of such direction, limitation, or appointment, gift or bequest, and as to so much thereof to which no such direction, limitation, or appointment, gift or bequest, should extend, upon trust to pay, apply, and dispose of the same unto and amongst the next of kin of his wife, according to the Statute of Distribution; and upon further trust to pay, apply, and dispose of and retain the residue of the said monies, stocks, funds, and securities unto and equally amongst themselves, the said John Cheese, Thomas Jeffries, and John Fletcher, their respective executors, administrators, and assigns.

The testator, at the time of making his will and of his death, was seised of real estate not comprised in the settlement of 1790.

Mary the widow, and John Cheese, Thomas Jeffries, and John Fletcher, survived the testator John Woodhouse. The three last persons, the devisees in trust, all died in the lifetime of the widow. Thomas Jeffries survived his co-trustees, and after his death his heir-at-law executed a conveyance for the purpose of vesting the real estates of the testator in himself and the defendant John Cheese, as a new trustee, upon the trusts of the testator's will.

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Mary the widow died in April, 1842, having by her will, dated in December, 1839, recited and devised as follows: "Whereas my husband by his last will and testament devised (after various devises and bequests) all other his manors, messuages, or tenements, farms, lands, hereditaments, and premises, and real estate *whatsoever and wheresoever, to the use of myself for life (subject to certain charges), and after my decease to the use of John Cheese, Thomas Jeffries, and John Fletcher, their heirs and assigns, upon certain trusts in the said will declared. And whereas part of the manors,

messuages, lands, and hereditaments, which my said late husband was possessed of, were settled in such manner that the same devolved to me as having survived him. And whereas I believe it was his wish that the said settled manors, messuages, lands, and hereditaments should pass by his will to the uses and upon the trusts thereby declared, and I am desirous of fulfilling his wishes : Now I do hereby give and devise all and singular the said manors, messuages, lands, hereditaments, and premises, and real estate whatsoever and wheresoever, to, for, and upon such uses, trusts, ends, intents, and purposes, and under and subject to such charges, powers, provisoes, and agreements as are in and by the said will of my late husband expressed, declared, and contained of and concerning the same ; and except, I charge all the said premises with the sum of 500*l.*, to be paid to Catherine the daughter of my sister Barbara Fletcher, my said husband having by mistake omitted her name in his said will. And whereas I have, since the decease of my said husband, purchased or become otherwise possessed of considerable real property : Now, therefore, I give and devise to John Cheese and Thomas Jeffries all and singular my real estate whatsoever and wheresoever, upon and for the trusts &c.” And the testatrix then declared the trusts of such last-mentioned devise to be, that her said trustees should sell her said real estate, and that the proceeds of such sale should fall into and be considered as part of her residuary personal estate. The testatrix, then expressing her desire to execute the power of appointment given *to her by the will of her husband, of the fourth part of his residuary real and personal estate, appointed the same to the trustees of her will, upon the trusts to which she had given her own residuary estate. The testatrix then bequeathed several legacies ; and as to the residue of the said trust-monies, she directed her trustees to divide the same into eight equal parts, seven of which she gave to her sister Althea Jeffries, and her nephew and niece Thomas and Althea Jeffries, and her nieces Barbara, Althea, Eliza, and Catherine Fletcher, and the remaining eighth share to trustees, upon trust for Mary Culsha, for her separate use, with remainder to her children.

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The bill was filed by several of the residuary legatees under the will of the testatrix, who were also legatees, whose legacies were payable after her death, under the will of the husband, for the execution of the trusts of both wills. The heir-at-law of the testatrix, who was the eldest son of her eldest brother, the heir-at-law

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of the testator, and the new trustee and devisees in trust, the personal representatives of the testator and the testatrix, and the other parties interested in common with the plaintiffs, were defendants.

The cause came on upon further directions.

The principal question related to the effect of the will of the testatrix, with reference to the settled estates. The bill charged, that, in regard to the settled estates and hereditaments specifically devised by her will, the said John Cheese, Thomas Jeffries, and John Fletcher, the devisees in trust, and the three residuary legatees named in the will of the testator, were all dead at the time of the decease of the testatrix; and that, to such extent as the devise in the will of the testatrix, of *the said settled estates and hereditaments to the uses declared by the will of the testator, failed or became incapable of taking effect, the settled estates and hereditaments formed part of the residuary estate of the testatrix, devised by her said will.

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Mr. Kenyon Parker and Mr. J. T. Humphrey, for the plaintiffs.

*Mr. Selwyn, for the other residuary legatees under the will of the testatrix; and Mr. Smale for other parties. * * **

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Mr. Hodgson, for the defendant John Cheese:

* * The meaning of the words of the devise in the will of the testatrix clearly is, that the settled estates shall go in conformity with her husband's intention, and that intention there is no difficulty in discovering, or in giving effect to.

Mr. Lee and Mr. Lloyd, for the heir-at-law of the testatrix:

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* * With regard to the one-fourth of the settled estates, the testatrix has not professed to execute her power. The Court will not infer that she had any intention to confirm the husband's will as to that fourth, the effect of which would be to make herself tenant for life, and her own next of kin purchasers. Whatever may be the decision with regard to the other three-fourths, the proceeds of the one-fourth of the settled estates are not disposed of, and are not comprised in the residuary devise: *Fitch v. Weber* (1), *Amphlett v. Parke* (2), **Humble v. Shore* (3), in which *Cresswell v. Cheslyn* (4) was cited.

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(1) 77 B. R. 8 (6 Hare, 145).

(3) *Infra*, p. 95.

(2) 34 B. R. 61 (2 Russ. & My. 221).

(4) 2 Eden, 123.

The VICE-CHANCELLOR, at the conclusion of the argument, suggested that a case should be prepared for the opinion of a court of law. The counsel for the heir-at-law declined to ask for a case, and the counsel for the other parties desired to have the judgment of this Court.

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THE VICE-CHANCELLOR :

I was desirous in this case that all the questions at law should be decided at law. But the parties have desired me to give my opinion.

The testatrix, having survived her husband the testator, gave certain of her estates "to, for, and upon such uses, trusts, ends, intents, and purposes, and under and subject to such charges, powers, provisoes, and agreements, as were in and by" the will of her husband "expressed, declared, and contained of and concerning the same." It was admitted in argument at the Bar, that the husband's will contained no devise of the wife's estate, and in strictness, therefore, upon that assumption there was no declaration of uses, trusts, or purposes, to which the devise of the wife's estate by her will could be referred. Besides this, divers of the devisees of the estates devised by the will of the husband died before the wife: some of those were beneficial devisees, and other devisees in trust.

The question before me arose upon claims made by parties claiming the wife's estate under the uses, trusts, and purposes declared in the husband's will of his own estate. The claims of these parties were rested upon the proposition, that the plain intention of the wife required that her will should be read as if she had devised her property to the uses, trusts, ends, intents, and purposes declared by the husband's will of his own property; and, if the intention of the wife were enough for me to act upon, I should probably have adopted that proposition, with its consequences. But the case of *Youde v. Jones* (1) too nearly resembles this case to justify me in doing so, without sending the case to law; and this the parties interested have declined asking me to do.

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I agree with the argument, that the death of the trustees could not deprive the cestui que trusts of any interest they would have taken under the wife's will, if the trustees had survived her. But *Youde v. Jones*, if it governs this case, displaces the rights of those cestui que trusts, upon a ground unconnected with the time when the trustees died.

The claims of the beneficial devisees represented by *Mr. Hodgson*,

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who died before the wife, would fail upon the same ground ; and it was therefore gratuitously, though not extrajudicially, that in the course of the argument I said, that the wife's will must speak from her own death, and that no person who did not survive her could take under her will, even if the trusts of her will could be found in that of her husband.

[*246] After the argument of the case, it occurred to me that the import of the will of the husband might possibly be affected, and a meaning thereby given to the devise of the wife, by the principle affirmed in the case of *Jones v. Roe* (1). I called the attention of counsel to that *case, and although I do not, upon consideration, think that it affords any ground for altering my decision in this case, I will add, that my decision does not proceed upon any doubt in my mind as to the correctness of the decision in the case of *Jones v. Roe*. I may also observe, that the will of the husband, in this case, was made before the late statute.

The only question which remains, is that of costs. If the bill had been filed by the wife or her representative, to have an account taken of the estate of her husband, the costs of that suit would have come out of his estate, except the costs occasioned by the wife having improperly blended her husband's assets with her own, which the Master by his report in this cause finds she did ; and those costs would properly have been payable by the wife, or out of her estate.

[*247] The costs of a suit to administer the wife's estate would, of course, come out of her own estate. In this case both estates have come to be administered in one suit, and the persons interested in the husband's estate have had the benefit of that administration ; and it was said, that they ought, therefore, to bear a portion of the costs of the suit. To this it was answered, that the suit was rendered necessary by the will of the wife, and that, if she had not improperly blended the two estates, no account would have been necessary of the husband's estate. It is difficult, if not impossible, for the Court to do exact justice in such a case ; for, in some degree, it is matter of speculation what would or might have been necessary in respect of the husband's estate, if no dispute had arisen respecting the wife's estate, and if the wife had not blended her husband's assets with her own. The wife's estate must clearly bear those costs which it would have had to bear, if the suit had not embraced *the husband's assets, and also the costs occasioned by blending the two together ; and I believe I shall best consult the justice of the

case by dealing with the costs as in a case in which the object of the suit is substantially to administer the wife's estate, of which the husband's estate is part, and in which the costs in the Master's office have been occasioned by a breach of duty on the part of the wife, and by charging the husband's estate with no costs, except the costs on further directions.

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Declare, that the estates comprised in the indentures of the 15th and 16th April, 1790, and 2nd and 3rd August, 1797, and of which, under the uses of those settlements, Mary Woodhouse, the testatrix, having survived her husband, died seised, were not well devised by her to the uses of her husband's will, but that they formed part of her residuary estate devised by her will.

HUMBLE v. SHORE (1).

(7 Hare, 247—249; 1 H. & M. 550, n.; S. C. 33 L. J. Ch. 188, n.)

1847.
March 12, 13,
16.

A gift by a will, of one-sixth of the testatrix's residuary estate to S. W., revoked by a codicil, and the same sixth given to S. W. for life, with a direction, after her decease, to pay a legacy thereout, and that the remainder of such sixth should sink into the residue of her (the testatrix's) personal estate, and be disposed of accordingly:

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Held, that the remainder of the sixth share of the residue was not thereby given to the other residuary legatees, but was undisposed of.

THE testatrix, Lydia Shore, by her will, dated in 1835, devised and bequeathed her residuary real and personal estate in trust for sale, and directed her trustees to stand possessed of one-sixth part of the monies, in trust for her cousin Sarah Whittaker, widow, her executors, administrators, and assigns. By a codicil, dated in February 1837, the testatrix directed that her trustees should stand possessed of one-sixth part or share of the residue of the net monies to arise and be produced as aforesaid, by her will given and bequeathed unto and in trust for her cousin Sarah Whittaker, her *executors, administrators, and assigns, upon the trusts thereafter mentioned; namely, upon trust to pay the interest, dividends, and annual proceeds thereof unto the said Sarah Whittaker during her life, as a

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(1) This case, as observed by LOPES, L. J. (see *In re Palmer* [1893] 3 Ch. at p. 374), "had an eventful and chequered existence," and "was constantly treated with scanty respect both by the Judges and the profession," until it was finally overruled in the case here mentioned, but the

traces which the decision has left in subsequent reports are so numerous that it may be convenient to retain this short report of the case. *In re Palmer* was followed by the C. A. in *In re Allan* [1903] 1 Ch. 276, 72 L. J. Ch. 159, 88 L. T. 246.—O. A. S.

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separate and inalienable provision; and, after her decease, the testatrix directed that her trustees should stand and be possessed of, and interested in, the sum of 2,000*l.*, part of the principal or capital of the same one-sixth part or share, in trust for the Reverend William Whittaker, the son and only surviving child of the said Sarah Whittaker, his executors, administrators, and assigns; and the testatrix directed, that, notwithstanding the postponement of the payment of the aforesaid legacy, the same should be a vested interest in the said William Whittaker, immediately upon her decease; and also, that the remainder of the said one-sixth part of the same trust money and premises should sink into the residue of her personal estate, and be disposed of accordingly. The testatrix made other codicils, the last of which was dated in July, 1838. She died in May, 1839. Sarah Whittaker died in the lifetime of the testatrix. The question was, whether the sixth share referred to, was by this form of expression given to the other residuary legatees, or whether it lapsed.

Mr. Temple, Mr. Romilly, Mr. Hodgson, Mr. Wood, Mr. Lee, Mr. Rolt, Mr. Pole, Mr. Willcock, Mr. Bigg, Mr. Heathfield, Mr. Daniell, Mr. Freeling, Mr. Phillips, Mr. Robson, and Mr. Maule, appeared for the different parties.

The cases cited on the argument were *Cresswell v. Cheslyn* (1), and the recognition of its authority by the LORD CHANCELLOR OF IRELAND (SIR EDWARD SUGDEN) in *Shaw v. M'Mahon* (2), and by the Vice-Chancellor KNIGHT *BRUCE in *Harris v. Davis* (3), and *Skrymsher v. Northcote* (4), and *Evans v. Field* (5), as opposed to the other cases.

[The following report of the VICE-CHANCELLOR's judgment from the short-hand writer's notes is taken from 1 H. & M. p. 550, *n.*]

[1 H. & M.
550] VICE-CHANCELLOR SIR JAMES WIGRAM:

I will dispose of the question about the next of kin, the only point about which I feel any difficulty, on Tuesday morning. In the meantime I will state the point on which I think my judgment must eventually turn.

By the will, one-sixth of the residue is given to Sarah Whittaker absolutely. By the codicil the testatrix recites that she had by her will or testamentary appointment given and bequeathed one-sixth of the moneys constituting the residuary fund arising from her

(1) 2 Eden, 123.

(2) 65 B. R. 724 (4 Dr. & War. 438).

(3) 66 B. R. 130 (1 Coll. 416).

(4) 18 B. R. 141 (1 Swanst. 566).

(5) 49 B. R. 479 (8 L. J. (N. S.) Ch.

264).

real and personal estate unto or in trust for her cousin, Sarah Whittaker, absolutely. And then she goes on in the following words:

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SHORE,

"And, whereas it is my will and meaning that the said Sarah Whittaker shall take and enjoy only a life interest in the aforesaid part or share of the said residuary trust fund, and, subject thereto, that the capital of the same fund shall be disposed of as hereinafter mentioned; Now, therefore, I direct." She then gives a direction, which I omit because it is inapplicable to the ultimate disposition of the fund. She then goes on to say what the disposition of the capital shall be, and importing that into the clause I first read, the case will be the same as if she had said "I give only a life-interest in the aforesaid residuary trust fund; and subject, thereto, the capital of the same shall sink into the residue of my personal estate, and be disposed of accordingly."

Now, if she had simply said, "I will that she shall take a life-interest only," that would be equivalent to a revocation of the bequest to her, except to the extent of the life-interest, and in that case *Cresswell v. Chestlyn* (1) would have been a direct authority for the proposition that the next of kin would be entitled to the property. The effect would have been, that in law the share, subject to her life-interest, would have sunk into the residue, and would have been disposed of as such. If the testatrix, instead of merely revoking the bequest [except as] to her life-interest, goes on to say, "I will that it shall sink into the residue," she expresses no more than the law would imply, and the case would be precisely the *same as it was before, and the estate would be distributed to the next of kin. The whole question turns on this: Besides saying "it shall sink into the residue," she gives a direction to her trustees, that it shall be disposed of accordingly; and the question is, whether, having willed it to sink into the residue, and be disposed of accordingly, those words "disposed of accordingly," mean disposed of as residue, or whether they mean something else. On that point I will look into the will to see whether from any parts of it I can collect an intention, or get any certain guide to go upon. I agree with *Mr. Rolt*, that the words confirming the will make no difference; because, though the codicil does republish the will, it republishes it in the same words in which it was written; and it is very rarely indeed that the effect of any disposition is altered by the codicil. The way in which the republication acts, just as it did before the late Wills Act came into operation, is, that it sweeps in property

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(1) 2 Eden, 123.

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which had come into distribution subsequent to the date of the earlier paper; except in that respect, it is in general a mere repetition of the words of the will, and those ordinarily speak in the same way as if the will had remained unaltered. This is not always the case, but it is the rule.

That is really the whole question with regard to this share.

VICE-CHANCELLOR SIR JAMES WIGRAM, after restating the facts nearly in the words of his former judgment, proceeded as follows:

Now, the case of *Cresswell v. Cheslyn* is a direct authority that where an absolute gift of a share of residue is afterwards revoked, that share becomes residue undisposed of, unless it is given to someone else.

The question, therefore is, on the codicil, whether there is a gift of Sarah Whittaker's share to any one else. The first direction is that it shall sink into the residue of the estate, but that, of course, is no gift to any one else.

But then there is a direction that it shall be disposed of "as after mentioned," and when you come to that to which the words "after mentioned" refer, you find a direction that it shall "sink into the residue of the personal estate, and be disposed of accordingly."

The question is, whether the direction that a share of the residue previously undisposed of is to be disposed of accordingly, is a gift to the residuary legatees. My opinion is, that it is not. I cannot find any gift to the residuary legatees in these words.

[This case was affirmed by Lord COTTENHAM, L. C., on appeal, but the reasons which influenced him are not known, as no note of the grounds of his decision can be found: see [1893] 3 Ch. at p. 372.—O. A. S.]

1847.
Nov. 18.

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V.-C.
[7 Hare,
249]

DAVENPORT v. JAMES.

(7 Hare, 249—251; S. C. 12 Jur. 827.)

Where a mortgage is made to two for a sum of money, of which each had lent a portion, one of the mortgagees may file a bill of foreclosure, making the other mortgagee a defendant, and the plaintiff in such a suit is entitled to the usual decree of foreclosure, on default of payment of the whole mortgage debt, in the proportions due to the plaintiff and defendant respectively, together with their respective costs.

A MORTGAGE for a term of years was made to two persons as joint tenants, to secure 2,500*l.*, of which it was alleged, and not denied, that 1,500*l.* had been advanced by one, and 1,000*l.* by the other of the mortgagees. The plaintiff Davenport, the mortgagee for

1,500*l.*, filed his bill of foreclosure against the mortgagors, or parties entitled to the equity of redemption, making Clare, his co-mortgagee, a defendant, on the allegation that he refused to concur in the suit. DAVENPORT
v.
JAMES.

Mr. Romilly and Mr. W. M. James, for the plaintiff. [250]

Mr. Wood, for the defendant the co-mortgagee.

Mr. Shapter, for the defendants entitled to the equity of redemption, submitted, that the mortgagees ought to have concurred in the suit, or were, if they thought proper to divide, only entitled to one set of costs.

It was admitted, that both the mortgagees were necessary parties. [*Titley v. Davies* (1), *Right v. Cuthell* (2), and other cases, were mentioned.]

The VICE-CHANCELLOR held, that the mortgagees were not bound to join as plaintiffs in the foreclosure suit, and that the usual decree of foreclosure must be made on default of payment of the principal, interest, and costs of both mortgagees.

STAMPS *v.* THE BIRMINGHAM, WOLVERHAMPTON, AND STOUR VALLEY RAILWAY COMPANY.

(7 Hare, 251—259; S. C. 12 Jur. 720; affd. 2 Ph. 673; 6 Rail. Cas. 123; 17 L. J. Ch. 431.)

[AFFIRMED on appeal, as reported in 2 Ph. 673: see 78 R. R. 240.]

1848.
June 27, 29,
30.
July 3, 4, 8.

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HUTTON *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY (3).

(7 Hare, 259—266; S. C. 18 L. J. Ch. 345; 13 Jur. 486.)

In the case of damage to a party whose lands are not entered upon, but are injuriously affected by the exercise of the powers of a Railway Company upon their own lands, or upon the lands of another party, and for which damage compensation is required to be made by section 6 of the Railways Clauses Consolidation Act (8 Vict. c. 20), it is not unlawful for the Company to execute the works which occasion the damage, before the amount of compensation for the same is ascertained, paid, or deposited.

THE plaintiff was the lessee for years and occupier of a corn-mill, and of a mill-dam and reservoir at Battersea, supplied by the tidal

(1) 60 R. R. 218 (2 Y. & C. C. C. 399).

(2) 7 R. R. 752 (5 East, 491).

(3) *Pugh v. Golden Valley Railway Co.* (1879) 12 Ch. D. 274 (affd. 15 Ch. Div. 330, 49 L. J. Ch. 721).

1849.
April 18, 28,
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waters of the river Thames. On the 5th of August, 1837, by an agreement of that date, the London and South Western Railway Company contracted with the plaintiff for the purchase of part of the land forming the mill-dam or reservoir, consisting of about two roods, for the purpose of carrying the railway over the same by a bridge. The price agreed upon was 950*l.*, which sum was to include the loss of land and water, the increased expense of clearing the mill-dam, general injury by severance, and all consequential damages, except certain matters thereafter specified. The agree-

[*260] ment contained a proviso, to the effect that *nothing in the agreement contained should give to the Company any right to stop up the mill-dam, or to impede the flowing of the water into the same, other than for the purpose of erecting the intended bridge, and maintaining and repairing the same; but that the mill-dam, and the use and occupation thereof, was to be retained by the plaintiff, and to be preserved to him by the Company, in such and the same manner as it would have been held by him under the lease thereof, if the same had not been taken by the Company, except as respected the building or repairing the bridge; nor was anything therein contained to prevent the plaintiff from having the free use and right of way along and over, as well as the then present banks of the mill-dam to be taken by the Company, as of the then intended new bank then to be made by them.

The 950*l.* was paid. The land purchased by the Company was conveyed to them, and the railroad-bridge was completed over the reservoir.

In 1847, the Company obtained a further Act, enabling them to widen and improve part of the railway, including the part carried over the reservoir. The Company, in pursuance of the latter Act, proceeded to widen the bridge. The plaintiff thereupon filed his bill, alleging that the effect of the alteration would be, to cause a further accumulation of mud, and a great loss of water, and to impede the flow of the tide into the mill-dam, thereby occasioning inconvenience to the plaintiff in the use and occupation of the mill. The bill alleged, that the Company had never paid or compensated

[*261] the plaintiff for the loss of any land or water, other than *that caused by the erection of the first bridge. The bill prayed that the Company might be restrained by injunction from widening or enlarging the bridge, or the piers or abutments, or from interfering with the flow of the tide into the mill-dam, or with the plaintiff's right of way and access along the banks of the dam and reservoir,

until the purchase-money or compensation to be paid to the plaintiff in respect of the diminution of the water, and the loss and damage the plaintiff would sustain by the works, had been ascertained and paid, according to the provisions of the Lands Clauses Consolidation Act, 1845 (1), and the Company's special Act of 1847, or as the Court should direct.

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The plaintiff having moved for the injunction, the defendants desired time to answer the affidavits, and the motion stood over, upon their undertaking to stay the works. Before the motion was brought on again, the Company proceeded under the 85th section of the Lands Clauses Consolidation Act, by procuring the appointment of a surveyor, who certified the damage at 42*l.*, which the Company paid into Court, giving the bond required by the Act. The damages were afterwards assessed by a jury at 200*l.* The only remaining question was the costs of the suit, which depended upon the question of the right of the plaintiff to the injunction when the bill was filed. This question was by consent argued upon the facts appearing by the affidavits.

The *Solicitor-General* and *Mr. J. H. Law*, for the plaintiff, argued, that the course which the Company had taken, after the motion was made, in proceeding under the 85th section of the Lands Clauses Consolidation Act, was an admission that the previous proceedings had been unlawful. They argued also, that the 84th section was explicit on the point.

[*262]

Mr. Wood and *Mr. Wickens*, for the Company, contended that the distinction was between the cases where lands were taken by the Railway Company, and where they were not taken, but injuriously affected by works done by the Company upon their own land: *Thicknesse v. The Lancaster Canal Company* (2), *Lister v. Lobley* (3). In the case where the damages are the consequence of works done on the land of the Company, there is indeed an obligation to compensate, but not to pay the compensation before the works are done. Not only may the damage be unexpected, but it may arise from necessary variations in the works, in the progress of their execution.

THE VICE-CHANCELLOR :

The plaintiff does not, by his bill in this case, dispute the right

(1) 8 Vict. c. 18.

(3) 7 Ad. & El. 124.

(2) 51 R. R. 692 (4 M. & W. 472).

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of the Company to widen the bridge in the way proposed, nor does he suggest that the manner in which the Company had proceeded to exercise the powers of the Act is in itself an excess of those powers; but the plaintiff insists that the Company had no right to do this, until they had paid the purchase-money or compensation agreed or awarded to be paid for his interest in the property injuriously affected by the execution of the works.

[*263]

I will first consider the case independently of the proviso in the agreement of the 5th of August, 1837, and *independently of every thing which has taken place since the bill was filed, and confine myself to the inquiry, whether the plaintiff is right in contending that the Company could not lawfully proceed with their works for widening the bridge, until they had paid to the plaintiff, or ascertained and deposited, in the manner required by the Act (1), the amount of compensation payable in respect of the damage from the execution of the works.

In answering this inquiry, I take it for granted, (for it is sworn by the defendants, and not denied), that the works they proposed to do, in widening the bridge, and all they had done preparatory to it at the time the bill was filed, was upon the land which they purchased and paid for, under the agreement of the 5th of August, 1837, and which was afterwards conveyed to them; and that they have not entered upon, and do not purpose entering upon, any part of the plaintiff's land. The case, therefore, is not one of the Company taking possession of the plaintiff's land before it is paid for, but of the Company doing work upon land already purchased and paid for in 1837, that is, upon land of their own, which works might injuriously affect the plaintiff's interests in the mill and reservoir; and the question I have to answer is, whether it was unlawful in the Company to commence their works before they took steps to ascertain and pay the amount of damage to the mill-dam and reservoir. The question must be answered by the statutes of the 8 Vict. c. 18, and the 8 Vict. c. 20.

[*264]

In the case of purchasing land, the first Act is explicit. By section 84 of the 8 Vict. c. 18, the price is to be paid before entry, except entries for certain preliminary *purposes, and in certain special cases provided by the Act; and damages directly consequent upon the purchase, and which the Act says are to be ascertained at the same time, may stand in the same position; but the case of damage to one person, consequential upon the exercise of the powers

of the Company upon their own land, or upon the land of other persons not complaining, may stand differently. Such damages are given, by the 8 Vict. c. 20. By that Act (1) the Company is to make to the owners, occupiers, and other parties interested in any lands injuriously affected by the construction of the railway, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise of their powers as regards such lands; and the amount of such compensation, except where otherwise provided by that Act, or the special Act of the Company, is to be ascertained and determined in the manner provided by the Lands Clauses Consolidation Act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof; but nothing is said as to the time when such compensation is to be paid. Upon this question, the right of the plaintiff to the injunction sought by his bill must have depended, and the question must be determined by the construction of the Act.

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In *Lister v. Lobley* (2), a similar question came before the Court of Queen's Bench. Lord DENMAN pressed the parties to take the opinion of the Court upon a case. The parties, however, could not agree upon a case. The unanimous opinion of the Court was, that it was not unlawful for the trustees of the road to commence works within their powers, which might be attended *with damage to others, before making compensation for such expected damage. That case is an authority in point; and the result of much inquiry has not led me to think the decision unsound. The ground upon which the Court went in that case, was the impracticability, in many cases, of knowing whether damage will be sustained or not, and of measuring it if it were certain. If the 8 & 9 Vict. c. 20, be carefully examined, it will be found, that there are many cases of damage contemplated, to which the observations of the Court of Queen's Bench apply with great force. I do not, however, mean to say more in the present case than this,—that, upon the authority of the case cited, I think the acts done by the Company at the time the bill was filed were not unlawful; and, assuming that, there was no ground for the interference of this Court.

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It was said, however, that the proviso in the lease altered the case. I cannot accede to that argument.

Assuming that the distinction is well founded, between an entry by the Company upon the lands of a stranger, and damage to the

(1) Sect. 6.

(2) 7 Ad. & El. 124.

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property of a stranger, consequential upon the lawful acts of the Company upon their own land,—assuming this, the plaintiff's argument must be, that the Company is to be considered and treated, for the present purpose, as entering *de novo* upon the plaintiff's land. I cannot apprehend the ground of such an argument. The object of the provision is plain. The possession and ownership of the land purchased by the Company, in August, 1837, might possibly have given them the right or power to interfere with the mill-dam and water for other purposes than those of erecting, repairing, and maintaining the bridge. The agreement might also have interfered with the plaintiff's use and occupation of the mill-dam, and his right *of way over and along the banks of the reservoir; and therefore, the proviso that the agreement should not give the Company any right to stop up the mill-dam or impede the flowing of the water, other than for the purposes therein mentioned, and that the plaintiff should have the right of way over the then existing banks and the new bank, might well have been intended to guard against such consequences. But the right which the Company claims to widen the bridge is not in any respect derived from the agreement of August, 1837: it is derived from the Act of Parliament, of 1847. The Railway Clauses Act entitles the plaintiff to compensation for damages sustained by him, by reason of the exercise of the Company's powers; but in estimating those damages, the Company must be considered and treated as owners in possession of the land they purchased of the plaintiff in 1837. There is nothing in the proviso inconsistent with that. The plaintiff's argument, if carried out, would require the Company to pay a second time for the land purchased in August, 1837.

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JONES v. HOW (1).

(7 Hare, 267—276; S. C. 19 L. J. Ch. 324; 14 Jur. 145.)

A father, upon the marriage of his daughter, covenanted with the husband, his executors, &c., by deed or will to give, leave, and bequeath unto his (the covenantor's) daughter an equal share with his other children of all the real and personal estate of which he should die seised or possessed. The daughter died in the lifetime of the father, and the father, having made some disposition of property in favour of a son in his lifetime, by his will devised and bequeathed his real and personal estate for the benefit of his widow and surviving daughters: Held, by the Court of Common Pleas, and by this Court concurring in the certificate, that the husband and

1848.
March 21, 22.
Dec. 16, 18,
22.
1849.
Jan. 11.
1850.
Feb. 13, 16.
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covenantee had not, under the circumstances, any good cause of action against the executor of the father; and that, if the father had died possessed of no personal estate, the husband could not have recovered any substantial damages in such action.

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By an indenture of settlement, dated the 8th of April, 1826, made previous to the marriage of the plaintiff and Mary his wife, the testator, William Way, the father of Mary, the wife, entered into a covenant, in the following words: "And this indenture lastly witnesseth, that, in consideration of the said intended marriage, and also in consideration of the settlement hereby made by the said Frederick Jones, he the said William Way, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, grant, and agree, with and to the said Frederick Jones, his executors, administrators, and assigns, that he the said William Way shall and will, by deed or writing, or by his last will and testament, give, leave, and bequeath unto the said Mary Way, one full equal eighth part or share, or such other part as shall be an equal share, with all and each of his children and child, of all estates, monies, real and personal estate, of which the said William Way shall die seised or possessed."

William Way had eight children at the date of the settlement. Two of such children died without issue, in the lifetime of Mary the wife of the plaintiff, leaving her one of the six surviving children.

In December, 1837, William Way, the testator, entered *into an agreement with his son W. W. Way, whereby the stock in trade, fixtures, and utensils of the business of maltsters, theretofore carried on in the names of the father and son, were delivered up to the latter, he giving his note of hand for 2,000*l.*, the value of the same, bearing interest at 5*l.* per cent. during the life of the father; and it was agreed that the executors of the father were not to claim the amount of the note, but the same was to be accepted by the son as a gift.

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Mary, the wife of the plaintiff, died in February, 1843.

William Way died in July, 1846, leaving one son and four daughters, and having by his will, dated in April, 1843, and by a codicil, dated in November, 1844, devised and bequeathed his real and personal estate to the defendants Thomas How and Alfred Mew, upon trusts for sale of such parts thereof as did not consist of monies, and for the application of the same for the benefit of his widow and daughters.

The plaintiff, alleging that Mary his late wife had devised and bequeathed to him all her right, title, and interest under the

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covenant, and that he had obtained letters of administration of her estate with the will annexed, filed his bill against the executors and devisees in trust, praying an account of the real and personal estate of which the testator was seised or possessed at his death, and of the reversionary shares, settlements, and post obit bonds and obligations given by the testator to any of his children in his lifetime; that the share and interest of the plaintiff under the covenant might be ascertained and conveyed, paid or transferred to him; or, if the same had been converted, that the defendants might be decreed to pay him the *value thereof; and that an account might be taken of the real and personal estate of the testator, and the residue thereof ascertained, and the same, or a sufficient part thereof, secured to answer the claims of the plaintiff under the covenant.

The defendants by their answer admitted, that William Way did not by any deed or writing, in his lifetime, perform his said covenant, and that he had not given to Mary, the deceased wife of the plaintiff, or to the plaintiff, any part or share of or in his (William Way's) real or personal estate. The defendants submitted, that the gift and bequest covenanted to be made, were only to take effect in the event of Mary, the daughter, being alive at the time of the decease of the testator, and that Mary was entitled to no more than a life estate or interest in the property referred to; that, even if the covenant did not fail of effect by the death of Mary in the lifetime of the testator, still the plaintiff was not interested in the real estate of the testator, inasmuch as any share or interest of Mary therein, upon her death, intestate as to the same, became vested in William Way, the testator, her heir-at-law and customary heir, and the same passed to the defendants by his will, upon the trusts thereof; and, with regard to the personal estate of the testator, the defendants said that the same was insufficient for the payment of his debts.

The defendants also submitted, by their answer, that the four daughters, the residuary legatees of the testator, were necessary parties to the suit. Upon this objection the cause was set down, [and it was held that all persons interested in the residuary estate must be parties to proceedings for the distribution thereof].

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The bill was amended, and framed as a creditors' suit. The amended bill prayed a declaration that the plaintiff was entitled to stand as a creditor on the estate of the testator under the covenant for the amount of the largest share of his said children in his

real and personal estate; and that, to ascertain what was due to the plaintiff under the said covenant, an account might be taken of the shares of the children of the testator in the real and personal estate of which the testator died seised and possessed, whether derived under the will, or by means of any reversionary settlements, or post obit or other obligations dependent on the life estate or other interest of the testator, or payable after his decease, and whether given to one or more of his said children; and that if the defendants should not admit assets to pay what was due to the plaintiff under the covenant, the usual accounts might be taken of the real and personal estate of the testator come to their hands, and of their application thereof; and that the same might be applied to answer the plaintiff's claim and interest in a course of administration.

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Mr. Wood and Mr. Haig, for the plaintiff, [cited *Jones v. Martin* (1), *Logan v. Wienholt* (2), *Fortescue v. Hennah* (3), and other cases]. [272]

The Solicitor-General and Mr. Haldane, for the defendants :

* * The suit is for a *legal demand, and therefore cannot be established without a trial at law. There is not, however, sufficient ground for directing a trial at law. It is not in dispute that the personal estate was insufficient for the payment of the debts of the testator, and this would be the case, even if the alleged advancement to the son was brought into the account; and the plaintiff has no beneficial interest in the performance of the covenant. The testator, William Way, was himself the heir-at-law of Mary Way, and her real estate is vested in the defendants, his devisees. [*273]

The VICE-CHANCELLOR directed a case for the opinion of the Court of Common Pleas on the following questions :

First, whether Frederick Jones has, under the circumstances, any good cause of action against the executors of William Way; and, if so, secondly, whether, if William Way had died possessed of no personal estate, and seised only of the copyhold estate above mentioned, Frederick Jones could have recovered any substantial damages in such action.

The Certificate of the Court of Common Pleas was—

First, that Frederick Jones has not any good cause of action.

(1) 5 R. R. 32 (5 Ves. 266, n.).

(3) 12 R. R. 137 (19 Ves. 67).

(2) 36 R. R. 215 (1 CL. & Fin. 611).

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Secondly, that, in the event supposed, Frederick Jones could not have recovered any substantial damages in such action.

On the equity reserved,

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Mr. Wood and Mr. Haig, for the plaintiff, said, that the court of law had proceeded upon *Laughter's* case (1), *and that great stress had been laid in the argument upon the fact that the words of the covenant were "give, leave, and bequeath," and not "or;" that *Laughter's* case was decided on the ground that the condition had become impossible; and that, in the subsequent case of *Studholme v. Mandell* (2), the rule laid down in *Laughter's* case was said to be incorrectly reported. Under such circumstances, and as the Court of Common Pleas had given no reasons for their certificate, the plaintiff asked that a case might be sent for the opinion of another court of law.

The *Solicitor-General* and Mr. *Haldane*, for the defendants.

THE VICE-CHANCELLOR :

In this cause I directed a case for the opinion of the Court of Common Pleas, upon the construction of a covenant which had become the subject of litigation between the parties. By this covenant (I will assume this construction, as being most favourable to the covenantee) the covenantor bound himself, by some act *inter vivos*, or by will, to leave his daughter, the wife of the covenantee, a certain provision. No act *inter vivos* was done by the covenantor, nor did his will contain any provision for her. The lady died in the lifetime of the covenantor. The circumstance that the covenantor had made no provision for the lady by his will was, I understand, considered immaterial, upon the ground that any provision by will would have lapsed, by the death of the lady in the lifetime of the covenantor.

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The case has been argued before three of the Judges, *who have certified that there had been no breach of covenant by the covenantor entitling the covenantee to recover damages against his estate. The question before me is, whether I should confirm that certificate, or send a case for the opinion of another Court. The practice of this Court in such cases, I understand to be, to adopt the certificate, unless the Court itself is dissatisfied with the conclusion involved in the certificate. In this case I am not assisted by knowing the reasons of the Judges of the Court of Common Pleas; but I understand from counsel that they considered the case by

(1) 5 Co. Rep. 21.

(2) 1 Ld. Ray. 279.

analogy to the reasoning of the Court in *Laughter's* case (1). The covenantor in this case has reserved to himself the privilege of not making the stipulated provision during his life, and the provision by will, it is said, has failed, not by his act or omission, but by the default of the legatee in his lifetime.

There cannot, I think, be any doubt that the intention of the parties is disappointed by this decision; where a parent, on the marriage of a child, covenants to make for that child a provision, by deed or will, it cannot be doubted that the provision is intended to be absolute, and that the mode of making it alone is intended to be left to the discretion of the covenantor. And a doubt crossed my mind of this nature: If the will of the covenantor had contained a provision in favour of the lady, and she had left issue living at her death, the new Wills Act would have prevented a lapse; and a doubt occurred to me whether the covenantor might not have made a will so as to have preserved to the lady the benefit of the covenant, notwithstanding her death in his lifetime—whether, in fact, he might not, by will, have done for her (dying without issue) that which the Wills Act would have done for her if she had left issue living at her death. I do not know whether this point was suggested in argument before the Court of Common Pleas; but I do not feel such confidence in the point as to make it proper to send the case a second time to law. I shall confirm the certificate.

Bill dismissed with costs.

WHITE v. PEARCE (2).

(7 Hare, 276—279; S. C. 18 L. J. Ch. 462; 13 Jur. 999.)

A defendant paying money to a plaintiff by way of compromise of the litigation, with notice that the plaintiff's solicitor has a claim for the plaintiff's costs of the litigation, may be ordered to pay the solicitor's bill of costs so far as the agreed amount of the compromise will extend.

At the hearing of a foreclosure suit, a decree was made for payment by the defendant to the plaintiff of the principal, interest, and costs, within six months after the Master's report; and by consent, in default of such payment, that the mortgaged estate should be sold with the approbation of the Master, and the purchase-money paid into Court. The Master reported the amount of the debt and interest to be 243*l.* 10*s.* 4*d.*, and the costs 117*l.* 15*s.* 11*d.* Default was made, and the particulars and conditions of sale were

(1) 5 Co. Rep. 21.

190, 197, 58 L. J. Ch. 442, 60 L. T.

(2) *Ross v. Buxton* (1889) 42 Ch. D. 630.

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carried in and approved by the Master, and the sale appointed and advertised to take place on the 2nd of June, 1849. The solicitor of the plaintiff having reason to suppose that an intention to compromise the suit was entertained by the plaintiff and defendant, gave notice to the defendant, and also to his solicitors, of his claim (as solicitor of the plaintiff in the cause) for the costs of the suit. The plaintiff and the solicitors of the defendant, acting on the behalf of the latter, afterwards agreed to settle the mortgage debt and the suit for a sum of 800*l.*, to be paid by the defendant to the plaintiff; 200*l.* of which was then paid, and 100*l.* retained in the hands of the defendant's solicitors, and the sale was countermanded.

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The solicitor of the plaintiff, by petition prayed that the plaintiff or the defendant might be ordered to pay the petitioner his costs out of any monies paid, or to be paid, to the plaintiff in respect of the debt, or debt and costs, the subject of the suit; and if it should appear that the defendant's solicitors had received from or on behalf of the defendant, any monies in respect of the amount of the debt and costs, for the purpose of settling the plaintiff's claim, that the defendant's solicitors might be ordered to pay the petitioners their costs thereout, so far as such monies should extend.

The *Solicitor-General* and *Mr. Hare*, for the petition. * * *

Mr. J. H. Palmer, for the defendant and his solicitors, opposed the petition, and contended, that having compromised the suit, as they were entitled to do, without any collusion with the plaintiff, or without any purpose of defrauding the petitioner, they were under no liability to the latter. In an *Anonymous* case (1), Lord *HARDWICKE*, on a similar claim by a clerk in Court, said, that the lien "does not extend to that degree as to prevent the client fairly and honestly from making an end with his adversary;" and he gave effect to the lien in that case, solely on the ground that the release was voluntary, without anything being paid.

The plaintiff did not appear.

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THE VICE-CHANCELLOR :

The petitioner has undoubtedly a lien for his costs upon whatever has been received or paid for compromising the suit. The Court does not, however, allow the lien to stand in the way of an amicable arrangement. There is nothing improper in the compromise; but, if the defendant, not being under any pressure, except that which

was the consequence of the decree, pays the debt of the plaintiff, with notice of his solicitor's lien, the question then is, whether the payment is or not made by the defendant in his own wrong. In *Welsh v. Hole* (1), Lord MANSFIELD puts the case of the assignment of a chose in action, which, in legal strictness, is not effectual, but still he says, as against the right of the assignee, the debtor, after notice, could not in equity discharge himself by a payment to the principal. The present is certainly not a weaker case. The defendant was asked to pay the money to the petitioner, and notice was given to him of the petitioner's lien for the costs of the suit. The estate would have been sold, and the money paid into Court, if it had not been for this agreement between the plaintiff and defendant. The agreement come to appears to be a very proper one, and I have no doubt that it was made *bonâ fide*; but I think the defendant, in the circumstances of the case, has paid the money in his own wrong, and that the petitioner has a right to proceed either against the plaintiff or defendant.

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The petitioner did not press for the order against the defendant's solicitors, and the order referred it to the Master to tax the costs of the plaintiff, not already taxed, and the costs of the petitioners of the petition, (the first-mentioned costs to be taxed as between solicitor and client) and directed the plaintiff and defendant, or one of them, to pay the petitioner the amount of *such costs when taxed, and also the 117*l.* 15*s.* 11*d.*, the costs of the plaintiff already taxed, (not exceeding in the whole the sum of 800*l.*, paid, or agreed to be paid to the plaintiff by the defendant or his solicitors, in respect of the matter in this suit) within fourteen days from the service of the order as to the costs taxed, and within the same time from service of the certificate of taxation as to the costs then directed to be taxed.

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GRIFFITH v. RICKETTS.

(7 Hare, 299—317; S. C. 19 L. J. Ch. 100, 399; 14 Jur. 166, 325.)

A conveyance of the equity of redemption of real estate was made to trustees, for sale, for the benefit of the creditors of the grantor, and upon trust, if there should be any surplus, to pay the same to him, his executors, administrators, and assigns, to and for his and their own absolute use and benefit: Held to be a conversion of the real estate into personalty, as between the real and personal representatives of the grantor.

Held, also, that the ultimate surplus of the proceeds of the real estate being reserved to the grantor, and the deed not being revoked, and no attempt having

1849.
Nov. 14, 16,
22.
Dec. 4, 5, 6, 7,
8, 9, 10, 11, 20.
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been made to revoke it, it was not material as between the real and personal representatives of the grantor, whether the deed was or was not revocable.

That the question whether the surplus proceeds of the trust property belonged to the real or personal representative, was not affected by the state,—whether of realty or personalty,—in which the surplus was found, although the state of the property might affect the character in which the surplus would go to the one or the other of such representatives.

If the author of a deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal and not real estate, from the delivery of the deed, and is equivalent to a gift of the expectancy of his heir-at-law to his personal estate.

The principle is the same in the case of a deed as in the case of a will; but in the former case the conversion takes place in the lifetime of the party making it,—in the latter, not until his death,—and the rights of the real and personal representatives, in each case, are governed by the simple effect of the instrument.

The *onus* of proving the reconversion is on the plaintiff, who claims under the heir-at-law of the author of the deed.

A person served with a *subpœna duces tecum* to produce a document at the hearing of the cause, may, at such hearing, be called upon his *subpœna*, and asked whether he produces the document, and if he declines to produce it, why he so declines, or other like questions confined to the mere purpose of production (1).

A conveyance for the benefit of creditors held not to be revocable by the grantor, as against any creditors with whom such communications had taken place, as would give them an interest under the deed, but, at the utmost, to be revocable only as to the surplus proceeds of the estate, after satisfying the creditors; and, whether the deed was revocable at the option of the grantor, as to the surplus,—*quære*.

A suit by the devisee of the heir-at-law of Edmund Griffith, claiming the equity of redemption of an estate mortgaged by Edmund Griffith to Richard Ricketts, in the year 1800. The defendants in possession insisted that they were purchasers without notice of any subsisting mortgage, and they resisted the alleged title of the plaintiff to redeem.

Several questions arose, and were argued in the cause. The decision ultimately turned upon the effect of a deed of 1810, whereby Edmund Griffith, the mortgagor, conveyed and assigned his real and personal estate to trustees, upon trust for sale, for the payment of his debts, and in case there should be any surplus of the trust monies, to pay the same to the said Edmund Griffith, his executors, administrators and assigns, to and for his and their own absolute use and benefit. The question was, whether the deed of 1810 operated as a conversion, so that, upon the death of the mortgagor
[*300] intestate, his personal representative became entitled *to the property comprised in the mortgage, to the exclusion of his heir-at-law.

(1) Cited on this point, *Lee v. Angas* (1866) L. R. 2 Eq. 59, 64, 35 L. J. Ch. 370, 14 L. T. 324.

The *Solicitor-General* and *Mr. Pirie*, for the plaintiff.

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Mr. Bethell, Mr. Walker, Mr. Kenyon Parker, Mr. Wood, Mr. Bacon, Mr. Piggott, Mr. Bird, Mr. Osborne, Mr. Chapman, and Mr. Selwyn, for the several defendants.

The deed of 1800, by which the mortgage was originally constituted, was not admitted by the defendants. A *Mr. Hinton*, who had been the solicitor of parties deriving their title from *Ricketts* the mortgagee, but was not the solicitor of any one of the defendants in the cause, was served with the *subpœna duces tecum*, in the form prescribed by the General Orders of December, 1833, and XXIV. of the 8th of May, 1845, to produce the mortgage deed of 1800.

At the hearing, the counsel for the plaintiff, in tendering his evidence, requested that *Mr. Hinton* might be called upon his *subpœna*.

The proposed course was objected to by the counsel for the several defendants as novel, and contrary to the practice of the Court.

On behalf of the plaintiff the cases of *Davis v. Dale* (1), and *Summers v. Moseley* (2), were cited, as showing that a party served with a *subpœna duces tecum* might be *called to produce the document without being sworn, and made a witness for the party calling him; that the claim of lien by the solicitor or party in possession of the document, was not an objection to its production: *Thompson v. Moseley* (3); or if it were such an objection, it enabled the plaintiff to give secondary evidence of the deed: *Doe d. Gilbert v. Ross* (4). * * *

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THE VICE-CHANCELLOR:

Dec. 4.

The plaintiff in this case claims to be mortgagor of lands, which are in the possession of the principal defendant in the cause; which lands he seeks by his bill to redeem.

From the nature of the defence made by the defendants, it has been deemed necessary by the plaintiff to prove the original mortgage deed, dated some time in the year 1800. And in order to do this, he has served a gentleman named *Hinton* with a *subpœna duces tecum*, to produce at the hearing of the cause a deed described in the *subpœna*. Of *Mr. Hinton* the Court knows nothing. He

(1) 4 Car. & P. 335.

(3) 5 Car. & P. 501.

(2) 39 R. B. 818 (2 Cr. & M. 477).

(4) 56 R. B. 639 (7 M. & W. 102).

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has not been examined upon interrogatories before the examiner, to prove that he has in his possession the deed described in the *subpcena*; nor (if the deed be in his possession) to prove from whom he got it, nor in what character, nor anything else relating to himself or the deed. Of the deed itself *I know nothing, except by the description of it in the *subpcena*.

At the hearing of the cause on a former day, the counsel for the plaintiff called Mr. Hinton upon the *subpcena*, and was proceeding to ask him questions (I do not say to examine him as a witness) touching the deed. This was objected to on the part of the defendants, as being a course unknown in the practice of this Court. And as I had not myself, and also ascertained that the Registrar then present had not, any recollection of a like question having arisen, and as the result of the cause might mainly be affected by my decision, I desired the cause to stand over to give me an opportunity of making an inquiry.

I will now state the conclusion to which I have come, as to the course to be pursued,—a conclusion which the parties may correct by appeal, if it be erroneous.

I have not been able to find any one who recollects the point having arisen before. Two propositions may, however, I think, be safely stated—one is, that the *subpcena* lies. The form of it is given at the end of the Orders of May, 1845. The second proposition is, that the plaintiff cannot, by means of the *subpcena*, obtain more than the mere production of some paper or parchment by the witness. The witness has not been sworn, and cannot, according to the practice of the Court, be sworn or examined as a witness, at the hearing of the cause; and the production of the paper or parchment by the witness, will put the plaintiff in no other position than he would have been in if he had obtained the possession of the instrument out of Court, and produced it at the hearing, except that it comes out of the possession of a Mr. Hinton, of whom the Court knows nothing.

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The question, then, is reduced to this: whether the plaintiff, for the mere purpose of obtaining the production of the instrument, has not a right to ask the witness in this Court the same questions as he might have asked an unsworn witness in a court of law, in precisely the same circumstances.

My opinion is, that the plaintiff's counsel has a right, first, to call the witness upon his *subpcena*; secondly, to ask him whether he produces the deed described in the *subpcena*; and thirdly, if he

do not produce it, to ask him why he does not produce it ; or other like questions confined to the mere purpose of production. Beyond this I am not called upon to express any opinion at the present moment.

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If the witness, admitting the possession of the document, shall refuse to produce it, the plaintiff's counsel must determine whether he will try to enforce the production, or tender secondary evidence of the deed, which, according to a late case, he may possibly have a right to do. But upon this point I at present give no opinion.

Mr. Hinton, appearing in obedience to the *subpœna*, was then asked by the plaintiff's counsel whether the deed of 1800, mentioned in the *subpœna*, was in his possession. Mr. Hinton said it was. He was then asked to produce it, and declined to do so, alleging that he had a lien upon the deed, as against the estate of Caroline Rosina Frost, deceased.

The VICE-CHANCELLOR refused to make an order that Mr. Hinton should produce the deed, observing, that *such an order would not be made as against a mortgagee, and the case of a lien was in substance the same.

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Secondary evidence of the deed of 1800 was then tendered, the Court reserving the question of its admissibility, and also the question whether, if such secondary evidence should be inadmissible, the plaintiff was entitled, in the circumstances of the case, to any further opportunity of proving the deed. These questions it became unnecessary to determine, the Court holding that the title of the plaintiff was displaced by the subsequent deed of 1810. The arguments on the latter point, together with such of the other facts as were adverted to on that part of the case, appear in the judgment.

THE VICE-CHANCELLOR :

The plaintiff in this case claims under the will of Edmund Griffith the younger, who was the heir-at-law of Edmund Griffith, to be entitled to the equity of redemption of freehold lands of inheritance comprised in a mortgage alleged to have been made of the same lands by Edmund Griffith to Richard Ricketts, in the month of December, 1800. The defendants in the cause, between whom and the plaintiff the contest in the cause has arisen, claim under Ricketts, the mortgagee ; amongst other defences they have

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insisted, that the plaintiff is not entitled to the equity of redemption of the mortgage in question. They insist that the equity of redemption was so dealt with by Edmund Griffith, that at his death his personal representative, and not his heir-at-law, was the party entitled to the equity of redemption. The personal representative of Edmund Griffith is not a party in the cause; and it was admitted by the plaintiff's counsel, at the hearing of the cause, *that, if I should be of opinion that the defence above-mentioned was well founded, the defect in the constitution of the suit could not be remedied by amending the bill, and making the personal representative of Edmund Griffith a co-plaintiff in the cause. But it was suggested, that, if the personal representative were made a defendant, and disclaimed, that would enable the Court to make a decree in the plaintiff's favour, whatever the original rights might have been. To that argument I cannot accede. The question is, whether the plaintiff, at the time of filing the bill, was entitled to or interested in the equity of redemption which he claims; if that question be answered in the negative, the disclaimer of the party entitled to it will not enable the plaintiff to sustain his suit. I had occasion to consider this point very early in my judicial life, and I found the authorities very clear upon it (1).

An objection for want of parties was founded upon the same theory as to the state of the property at the death of Edmund Griffith; it was said, that at all events the case was not so clear that I could properly decide it against the personal representative of Edmund Griffith, in his absence from the record; and a like objection for want of parties was said to arise in respect of the trustees and creditors of Edmund Griffith, interested under a deed of trust, upon the construction and effect of which the defence above mentioned depends.

I proceed, in the first instance, to consider this ground of defence.

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The mortgage, as already observed, was made in the month of December, 1800. In 1805 or 1810, (but I *think I must say in 1805,) the mortgagee entered into possession, and the possession has ever since been and now is in the mortgagee or persons claiming under him. The mortgagor has been out of possession ever since possession was taken by the mortgagee.

In 1810 Edmund Griffith executed a deed by which the equity

(1) See *Mounsey v. Burnham*, 58 R. R. 11 (1 Hare, 15), and *Heath v. Chadwick*, 78 R. R. 238 (2 Ph. 652).

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of redemption, and other property real and personal, was transferred to trustees, upon trust to pay the debts of Edmund Griffith. This deed was of two parts, and made between Edmund Griffith of the first part, and the trustees Harford and Winpenny of the second part. The deed recited, that a sum of 563*l.* had been advanced by Isaac Cooke to Edmund Griffith, and that Edmund Griffith was indebted to several other persons, and that he had agreed to convey and assign all his real and personal estate unto and to the use of Harford and Winpenny, their heirs, executors, administrators, and assigns, (subject, nevertheless, to such mortgages or other charges and incumbrances as affected the same,) in trust for the benefit of all his creditors; and it was witnessed, that, in pursuance and part performance of such agreement, and in order to raise a fund for the payment of his debts, the said Edmund Griffith released and confirmed all his real estates, with the appurtenances, (subject as aforesaid,) unto and to the use of Harford and Winpenny, their heirs and assigns, in trust nevertheless, with all convenient speed to sell and dispose of the same, either by public auction or private contract, with power to give receipts for the purchase-money, and to stand possessed of, and interested in, the monies which should arise from such sale or sales, and also of the rents, issues, profits, produce, and proceeds thereof; in the meantime, in trust, in the first place, to pay the said sum of 563*l.* to Isaac Cooke, and then to retain and reimburse themselves their costs and expenses in *the execution of the said trusts. And upon further trust, by and out of the trust monies to pay and discharge all other the debts due from Edmund Griffith to any other persons, so far as the trust monies would extend; and, in case there should be any surplus of the trust monies, in trust to pay the same unto Edmund Griffith, his executors, administrators, and assigns, to and for his and their own absolute use and benefit. Edmund Griffith thereby covenanted not to revoke the powers given to the trustees, nor interfere in any way to prevent the trusts from being carried into effect,—that he would aid in the execution of the trusts, and, if necessary, join and concur in the sales of the estate and property; and the deed contained a covenant for further assurance. Upon the effect to be given to this deed, and certain acts of the parties, the validity of the defence I am now considering depends.

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One question much argued at the Bar was, whether the deed was revocable by the mere act of Edmund Griffith. That it was not absolutely revocable by the mere act of Edmund Griffith is too

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clear for argument. Clearly it was not revocable as against Cooke, nor against Harford, if it be true, as the evidence states, that he was a creditor of Edmund Griffith for 1,300*l.*; nor could the deed be revocable against the creditors of Edmund Griffith, if any, between whom and the trustees such communications had taken place as would give them an interest under the deed (1). The question of revocation must at least be confined to the surplus proceeds of the estate comprised in the deeds, which would remain after satisfying the claims of Cooke, Harford, and such other creditors, if any, as had acquired an interest under the deed. If it were necessary, as I think it is *not, to decide whether the deed was revocable at the mere option of Edmund Griffith as to the surplus proceeds just mentioned, I am not, as at present advised, prepared to decide in the affirmative. A voluntary conveyance of property upon trust to pay creditors not parties to the transaction has been very reasonably held to create a trust for the author of the deed, and not for his creditors. The transaction is assimilated to the case of a debtor putting money into the hands of his own agent to pay his debts, in which simple case it is clear that the debtor may countermand the authority, unless the agent has acted upon it, so as to give the creditors an interest in the money in his hands: *Bill v. Cureton* (2), *Wilding v. Richards* (3). On the other hand, it is equally clear that a voluntary conveyance of property to trustees upon trust for a third party, may create an indefeasible trust in favour of that party: *Ellison v. Ellison* (4), *Ex parte Pye* and *Ex parte Dubost* (5), *Pulvertoft v. Pulvertoft* (6). The difference in principle between the two classes of cases is marked and obvious; but to decide to which of the two classes a given trust deed belongs is often a task of difficulty; it depends upon the intention of the author of the deed, to be collected from the deed itself, and such surrounding circumstances as may be admissible in aid of the interpretation of the deed. The present case is not one of simple conveyance to trustees upon trust to pay the debts of Edmund Griffith. The deed contains a covenant on the part of Edmund Griffith not to revoke the deed, and also a covenant on his part to do all acts necessary on his part to effectuate the purposes for which the deed was made.

(1) See *Acton v. Woodgate*, 39 R. R. 251 (2 My. & K. 492).

(2) 39 R. R. 258 (2 My. & K. 503).

(3) 66 R. R. 234 (1 Coll. 655).

(4) 6 R. R. 19 (6 Ves. 656).

(5) 11 R. R. 173 (18 Ves. 140).

(6) 11 R. R. 151 (18 Ves. 84).

It was said, in argument for the plaintiff, that as the *deed without the covenants by Edmund Griffith would make the trustees, trustees or agents for Edmund Griffith, the covenants in question were in substance covenants by Edmund Griffith with himself, and, therefore, binding upon himself only so far as he might think fit. It cannot, I think, have been expected by the counsel, who urged this argument, that it would prevail with me. The covenants in question are part of the deed, and the character of the deed must be determined from a view of all its provisions, including those covenants, whereas the argument fixes the character of the deed without reference to the covenants, which are as important as any other parts of the deed in fixing its character. To show this, it is only necessary to put hypothetically the case which actually existed. Edmund Griffith was in prison for debt; and in order to release him, it was necessary to raise money. Money was accordingly raised for the purpose; and it was to provide for the repayment of the money so raised, as well as to pay the other debts of Edmund Griffith, that the deed of 1810 was made. It is not too much to assume in such a case, that Cooke and the trustees should require a deed irrevocable by Edmund Griffith, for the purpose of securing the payment of Edmund Griffith's debts; but, as I have already observed, I think it immaterial for the purposes of this suit, whether the deed was revocable by Edmund Griffith or not. It appears to me sufficient, for the purposes of the plaintiff in this suit, that the ultimate surplus of the property comprised in the deed was reserved to Edmund Griffith. The value of this ultimate surplus might be materially affected by the revocable or irrevocable character of the deed; but the only question with which the plaintiff in this cause has to do is not the value of the equity of redemption which he claims, but who are the persons entitled to that equity of redemption. If Edmund Griffith did *nothing to revoke the deed, the case will be the same whether it was revocable or not. If he attempted to revoke the deed, the same being irrevocable, I should apply that attempt to the ultimate surplus, after paying all his debts, precisely in the same manner as I should apply it to the surplus remaining after paying Cooke's debts and any other debts which the trustees had become bound to pay. In other words, for the mere purpose of determining the questions of conversion and re-conversion, the same reasoning will apply to so much of the property comprised in the deed, whether that were the ultimate surplus after paying all his debts, or any larger part of the property.

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Two questions then present themselves for consideration : first, what is the effect of the deed as between the real and personal representatives of Edmund Griffith ? and, secondly, is the effect of the deed altered by anything which has since taken place ?

In considering the former of these questions, I shall assume that the latter is to be answered in the negative, and shall also suppose Edmund Griffith to have died not later than the year 1820, that being (as I understand) a period down to which the trustees under the deed of 1810 certainly continued to act in execution of the trusts.

The question to be answered, it must always be remembered, is not, whether the surplus proceeds of the trust estates are real or personal estate, but to which of the testator's representatives those proceeds, whether real or personal estate, belong.

[*311] If the question arose under the will of Edmund Griffith, and not under his deed, I should perhaps have little *difficulty in answering the question ; I should follow my own decision in *Fitch v. Weber* (1), which was founded upon the authority of a case before Lord Thurlow (2). The will speaks from the death of the testator, and whatever is deemed real estate at the time of his death *prima facie* belongs to his heir. A contemporaneous declaration that his real estate shall be turned into personalty may alter the character of the property which the heir-at-law takes, but unless it be given away from the heir, there is no reason why he should not take it, although the trusts of the will may oblige him to take it as personal estate and not as real estate.

If the question in this cause had arisen under the will of Edmund Griffith the question would be, whether the limitation of the surplus to the executors of Edmund Griffith (who could not take beneficially) was a gift of the surplus to the next of kin, and the decision between the two classes of representatives would be governed by the answer to that question.

But a deed differs from a will in this material respect. The will speaks from the death, the deed from delivery. If, then, the author of the deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal and not real estate from the delivery of the deed, and consequently at the time of his death. The deed thus altering the actual character of the property, is, so to speak, equivalent to

(1) 77 R. R. 56 (6 Hare, 145).

(2) *Robinson v. Taylor*, 2 Br. C. C. 589.

a gift of the expectancy of the heir-at-law to the personal estate of the author of the deed. The principle is the same in the case of a deed as in the case of a will; but the application is different, by reason that the deed converts the property in the lifetime of *the author of the deed, whereas, in the case of a will, the conversion does not take place until the death of the testator, and there is no principle on which the Court, as between the real and personal representatives, (between whom there is confessedly no equity,) should not be governed by the simple effect of the deed in deciding to which of the two claimants the surplus belongs. It was in this view of the case that I observed during the argument, that the status in which the property was found could not, as it appeared to me, affect the question to whom it belongs. In this view of the question I find myself confirmed by the language of Sir W. GRANT, in *Thornton v. Hawley* (1). In that case the question was, whether money, the subject of a marriage settlement, was absolutely required to be laid out in land, or conditionally only. Sir W. GRANT decided, that the requisition was absolute, and said, "There is no weight in the circumstance that the property is found in the shape of money or land, for the character is to be found in the deed; and in *Wheldale v. Partridge* the LORD CHANCELLOR lays down, in which I perfectly concur, that it is a circumstance that goes no way, except when the fund gets into the possession of a party who would have it in either way" (2). Then, after observing that the money in that case never came into the hands of any one who could determine whether it should be money or land, he adds, "We must go back to the deed, upon which the true construction is, that it must be considered land."

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There can be no doubt as to the mere construction of the deed in the present case; the deed gives the surplus to Edmund Griffith, his executors, administrators, and assigns. I need not inquire how the case would *be if Edmund Griffith had received the money, and dealt with it as his own estate. The first question is, how the case would be if the trustees had sold the land in the lifetime of Edmund Griffith, and had the money in their hands. In that case it would, I apprehend, clearly belong to the personal representative of Edmund Griffith. The words of the deed require this, and the case of *Van v. Barnett* (3), as explained by the plaintiff's counsel, supports the conclusion; some of the observations *of Lord

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(1) 7 R. R. 359 (10 Ves. 129).

(3) 19 Ves. 102; see next page.

(2) 7 R. R. 366 (10 Ves. 138).

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THURLOW, in the case of *Robinson v. Taylor* (1), above referred to, throw light upon this subject.

The question, however, remains as to the surplus property sold after the death of Edmund Griffith, or not required to be sold to pay his debts; the answer to this question must be found in the deed. I can understand the argument which alters the nature of the property, according as it is actually sold or not sold; but I cannot understand the reasoning which, in the case of a deed, would give the surplus to a different person, according only to the time when the trustees may happen to execute the trust for sale. In the absence of authority, therefore, I should conclude that the personal representative of Edmund Griffith, and not his heir, is the party entitled to the surplus of the property comprised in the deed of 1810.

With respect to authority, the late case of *Biggs v. Andrews* (2) is a direct authority in point. It is true, indeed, that the language of the deed in that case does in a popular sense express more clearly than the language in the present case, the intention of the author of the deed, that the surplus property should become personal estate; but the limitation of the surplus to Edmund Griffith, his executors, administrators, and assigns, expresses in technical language all that is expressed in popular language in the case of *Biggs v. Andrews*; and I am not at liberty to suppose that Edmund Griffith, using technical language, did not understand its effect.

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The case of *Van v. Barnett* appears to me to be an authority in support of the same proposition. In that *case, Van conveyed his property to trustees, upon trust to sell, and pay his debts, and to pay the ultimate surplus to Van, his executors, administrators, and assigns. It appears, by searching the Registrar's book, that Van filed his bill, complaining of the conduct of his trustees. He did not, however, seek to revoke the deed, but prayed, in effect, that the trusts of it might be executed by the Court. In the suit, as I understand it, real estate was sold in the lifetime of Van, and the proceeds came to be administered by the Court according to the trusts of the deed. Van died, and the question arose between his real and personal representative, as to the surplus proceeds not required to pay Van's debts. Lord ELDON decided in favour of the personal representative, but gave no opinion as to the real property, if any, remaining unsold. Whether there were any such, does not, I think, appear. That case decides, that the trusts of the deed

(1) 2 Br. C. C. 589.

(2) 5 Sim. 424.

deprived the heir-at-law of his expectancy, so far, at least, as related to real estate converted before the death of Van. But if it be once admitted that that is the effect of the deed as to part of the property, I cannot follow the reasoning which would ascribe any other effect to the deed in its application to other parts of the property. The sale or non-sale of the trust property may affect the character in which any surplus may go to the party to whom the deed gives it, but cannot determine, or assist in determining, the person to whom it is given. Such an intention cannot be ascribed to Edmund Griffith without express words, or the clearest implication, of which I find none in the present case. I think, therefore, both upon principle and authority, the personal representative of Edmund Griffith, and not his heir-at-law, is the party entitled to the surplus of the property comprised in the deed of 1810.

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Many *dicta* may be found in apparent conflict with what I have decided; but the *dicta* will, I believe, be *reconciled with the present decision, by adverting to this—that those *dicta* are applied to wills, and not to deeds, or to deeds in which there has been no disposition of the ultimate surplus, or none inconsistent with the claim of the heir.

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I have referred to the Treatise on Conversion, by Leigh and Dalzell, but do not find anything in it which conflicts with the above conclusion. The distinction is that which I have noticed above.

The remaining question then is, “Is the effect of the deed altered by any thing which has since taken place?” This must be answered by inquiring whether Edmund Griffith did any thing in his lifetime indicating an intention to alter the state of the property, as it was fixed by the deed of 1810. Two points were relied upon in argument by the plaintiff’s counsel—First, the length of time that had elapsed since anything was done by the trustee; and secondly, the suit of Edmund Griffith in 1827. With respect to the former point, it is not the mere lapse of time, but the acts of parties during that time, that must be looked at. The evidence shows that the debts of Edmund Griffith, provided for by the deed, have not been satisfied. If, indeed, I am to give full effect to what the witnesses say, Cooke’s debt, which is specified in the deed, and a debt of 1,300*l.* owing to Harford, one of the trustees, and the debts of any other creditors between whom and the trustees communications may have been made, are still unpaid; and the trustees only

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ceased to act in paying the debts, when they were unable to realise assets for the purpose. In the meantime, the property which is the subject of this suit has been since 1805 in the possession of mortgagees, *and Edmund Griffith has neither enjoyed it nor asserted a title to it adverse to the trustees, unless the suit of 1827 be an act of that description. I may observe, however, that in strictness it is not necessary that I should insist upon this evidence, for the *onus* is on the plaintiffs to prove the reconversion, and it is sufficient that they have not so done.

With respect to the suit of 1827, the trustees were not parties to it. The suit does not seek to displace them, and the attempt of Edmund Griffith to redeem the property in that suit is not only consistent with the deed of 1810, but in strictness must be intended as the act of Edmund Griffith in furtherance of his covenants in the deed of 1810. The circumstance that that suit was not prosecuted with effect may well be taken to explain why the trustees have been hitherto unable completely to carry out the trusts of the deed. So long as Cooke's debt or any part of it, or the debt of Harford or of any other creditor between whom and the trustees communications may have been made,—so long as any of such debts remain unpaid, I cannot assume that the trust deed has been abandoned by the parties interested in it.

DOUGLAS v. WILLES (1).

(7 Hare, 318—330.)

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Feb. 20, 21.
May 22.

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By a settlement of trust funds for the benefit of a husband and wife for their lives, with remainder to the children of the marriage equally, it was provided, that if the husband should, during his life, advance or pay any monies for or on account of the advancement or preferment in life of any child of the marriage, or in case any lands or tenements, monies, goods, or chattels, should descend or come by or from him unto or for the benefit of any such child, then such monies, goods, and chattels, and the value of such lands or tenements, should be accounted as part or in full of the portion provided by the settlement, unless the husband should by writing declare the contrary :

Held, that the advances and payments referred to in the first part of the provision should be construed advances and payments made *inter vivos*, perfected in the lifetime of the husband ; and that the lands, tenements, monies, goods, or chattels, in the second part of the clause, should be confined to matters not perfected, or not having effect until after his death.

That property which, during the coverture, accrued to the husband and wife, in right of the wife, and by a settlement, to which the husband and

(1) *Cooper v. Cooper* (1873) L. R. 8 Ch. 813, 43 L. J. Ch. 158, 21 L. T. (N. S.) 321.

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wife were parties, was settled upon them for their lives, with remainder to their children, as they or the survivor of them should appoint, (but which was not otherwise received or reduced into possession by the husband,) was not property to be accounted for, as part of their portion, by the children to whom the husband and wife, or the survivor of them, afterwards appointed it.

That the value of a leasehold house, assigned by the husband in his lifetime to one of the children of the marriage, for his more comfortable maintenance and support, did not affect that child's share of the trust fund.

That an advance by the husband in his lifetime to one of his daughters of a sum of money for the purpose of apprenticing her son—the daughter's share of the trust fund having been settled upon herself and her husband, with remainder to her children—did not affect her share of the trust fund.

THE suit was brought to execute the trusts of an indenture of settlement, dated the 20th of April, 1790, made subsequent to the marriage of Charles Johnson and Mary his wife, in pursuance of an agreement entered into before the marriage, whereby a sum of 10,000*l.*, vested in trustees, parties to the deed, was settled upon trust for Charles Johnson for life, remainder upon trust, to pay Mary Johnson an annuity of 200*l.* for her life, and subject to such trusts, for all and every the children and child of the marriage, equally, to be assigned and transferred to them : as to sons, at their ages of twenty-one years, and as to daughters at that age or marriage. The deed contained a clause of survivorship between the children in case of the death of a daughter under twenty-one or marriage, or of a son under twenty-one. And the deed contained the following proviso: "Provided also, that if the said Charles Johnson shall, at any time or times during his life, advance or pay any sum or sums of money for or on account of the advancement or preferment in life of any or either of the child or children of the said marriage, *or in case any lands or tenements, monies, goods, or chattels, shall descend or come by or from him the said Charles Johnson, unto or for the benefit of any or either of the said child or children, then and in such case, such sum and sums of money, goods, and chattels, and the value of such lands or tenements, shall be accounted as part, if less in value than the portion or portions last hereinbefore provided or intended for the same child or children; but if as much or more in value, then in full of the same portion, unless he the said Charles Johnson shall, by writing under his hand, or by his last will and testament in writing as aforesaid, declare the contrary."

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Of the trust fund, 8,000*l.* was paid or provided by John Johnson,

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the father of Charles, and 2,000*l.* by William Willes, the father of Mary; and it was provided, that if there were no children of the marriage, or all the daughters should die before twenty-one or marriage, and sons before twenty-one, the trustees should stand possessed of the 8,000*l.* as Charles Johnson should appoint; and if no appointment by Charles, then for John Johnson, his executors, &c., and of the 2,000*l.* as Mary should appoint; and if no appointment, for William Willes.

Nine children of the marriage attained twenty-one years of age, and became objects of the power. Three of them, Charlotte, Lucy, and Felicia, were not advanced or preferred in any manner by Charles Johnson in his lifetime. The other six children, Mary, John, Francis, Edward, Harriet, and William, derived property from or through Charles Johnson, in his lifetime, in several forms:

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1. By a deed of settlement of the 31st of August, 1815, to which Charles Johnson and Mary his wife were parties, after reciting that the said Charles Johnson *and Mary his wife were entitled to one-sixth part of the residuary estate of Archdeacon Willes, just then deceased, and that they had determined to assign the same upon trusts, the same was so assigned to trustees, upon trust for Charles Johnson for life, remainder to Mary his wife for life, remainder to the children of Charles and Mary, born and to be born, as Charles and Mary, and the survivor of them, should, in manner therein mentioned, appoint; and in default of such appointment, to their children, born and to be born, as therein mentioned. In exercise of this power, Charles Johnson and Mary his wife, by a deed poll of the 29th of January, 1821, appointed 2,000*l.* to Charles, 2,000*l.* to Edward, and 1,000*l.* to Harriet, subject to the life interest of Charles and Mary in the residuary estate of Archdeacon Willes. By another deed poll of January, 1826, Charles and Mary appointed 832*l.* 19*s.* 6*d.* of the same fund to William, subject to their life interest, and by a subsequent deed poll Charles and Mary appointed 438*l.* 18*s.* 2*d.* to William the same son, subject to their life estate.

The Master found that the one-sixth of the residue of the estate of Archdeacon Willes—the property settled by the indenture of the 31st of August, 1815—consisted of the sums of 5,000*l.* and 3,000*l.* respectively, secured by mortgage, making together the sum of 8,000*l.*, and of the sum of 1,271*l.* 17*s.* 8*d.* Consols, and which said respective sums were the absolute property of the said Charles

Johnson by virtue of his marital right, and consequently the portions thereof so appointed were his absolute property in such right.

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2. By an indenture of the 10th of December, 1819, Charles Johnson, in consideration of the love and affection he bore to his son John, and in order to provide for his more comfortable maintenance and support, assigned *to him, for the residue of ninety-nine years, commencing in 1788, a leasehold house in High Street, Mary-le-bone. John obtained the benefit of this assignment in the year 1829; and the value of the interest so assigned to him was then 1,587*l*.

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3. By an indenture of the 21st of June, 1838, Charles, in consideration of his love and affection for his wife Mary, and for his son Francis, assigned to Francis, his executors, administrators, and assigns, a dwelling-house and close of meadow land in the county of Somerset, for the residue of a term of 1,000 years, upon trust for his wife Mary for life, with remainder to Francis absolutely. The value of this house and acre of land at the death of Mary was 390*l*.

And, 4. The Master found that the testator, Charles Johnson, previous to his decease agreed with his said daughter, the plaintiff Mary Douglas, to advance her a sum of 525*l*., in order to enable her to apprentice one of her children to a surgeon; and he, previously to his decease, advanced her the sum of 367*l*. 10*s*., and after his decease, his executor advanced her the remaining sum of 157*l*. 10*s*., making together the entire sum of 525*l*.

Edward died in the lifetime of his father. Under the will of Charles Johnson, and the sole appointment of Mary his wife, who survived him, Mary, John, Francis, Harriet, and William, who had previously received the benefits above stated, and Charlotte, Lucy, and Felicia, who had not before received anything in the nature of advancement or preferment, took interests. Charles Johnson, by his will, dated in November, 1834, gave all his real estate to trustees, upon trust to sell and to add the net proceeds to his personal estate; and he gave those proceeds and his personal estate to trustees, upon trust for his wife, for life, and after her death *for his eight children then living: the shares of his daughters to be for their separate use, during their then present coverture, and in case they should survive their husbands, to them absolutely; but as to the shares of such of them as should die in the lifetime of their husbands, upon trust for their children, as therein mentioned. The Master found that a sum of 1,756*l*. 3*s*. 9*d*.

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had been divided in respect of the residuary estate of Charles Johnson, being 219*l.* 10*s.* 5½*d.* for each of the eight shares; and that a sum of 231*l.* 13*s.* 9*d.* was then divisible, yielding 28*l.* 19*s.* 2*d.* for each eighth share. By a deed poll of the 18th of August, 1843, Mary Douglas, in exercise of the power given to her by the indenture of the 31st of August, 1815, appointed a sum of 3,000*l.*, and all other unappointed monies, subject to the trusts of the said indenture of August, 1815, in ten equal shares; as to one of such shares in trust for her eldest son John, his executors, administrators, and assigns absolutely, and as to one other of such shares, in trust for her second son Francis, his executors, administrators, and assigns absolutely, in addition to the sums then already appointed to him; as to two other of such shares, in trust for her younger son William, his executors, administrators, and assigns absolutely, in addition to the sums then already appointed to him; as to one other of such shares, in trust for her daughter, the said plaintiff Mary Douglas, her executors, administrators, and assigns, for her own sole and separate use and benefit; as to one other of such shares, in trust for her daughter Charlotte, the wife of C. C. Eyre, her executors, administrators, and assigns, for her and their own use and benefit; and as to one other of such shares, in trust for her daughter Harriet, her executors, administrators, and assigns, to and for her own sole use and benefit and disposal, in addition to the sum then already appointed to her; as to one other of such shares, in trust for her daughter *Felicia, her executors, administrators, and assigns absolutely, and to be paid into her own hands for her own use, without being subject or in any manner liable to the trusts of her marriage settlement or any other trust whatsoever; and as to the remaining two of such ten shares, in trust for her youngest daughter Lucy, her executors, administrators, and assigns, for her own sole and separate use and benefit, without being liable or subject to the trusts of her marriage settlement. The Master found that these ten shares consisted of 300*l.* each.

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Charles Johnson did not, by any writing under his hand, or by his will, declare that any such sum or sums of money, goods, and chattels, or the value of any lands or tenements, should not be accounted as part of the portion or portions provided by the indenture of April, 1790.

It appeared also by the report, that one of the children had aliened his share of the property comprised in the settlement of April, 1790; that the shares of several others had been settled

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upon their respective marriages, for the benefit of the respective settlors and their issue; among others, the share of the plaintiff Mary was, by articles dated in May, 1815, made upon her marriage with Richard Douglas, so settled, that the same, in the events which had happened, belonged to the plaintiff Mary Douglas, for her separate use for life, and after her death, as to one moiety of the annual produce thereof, to the assignees in bankruptcy of her husband during his life, and subject thereto to the children of the marriage, (three of whom were living and were defendants,) as the plaintiff Mary, in manner therein mentioned, should appoint; and in default of appointment, unto and amongst all the children of the marriage, *or such of them as being a son should attain

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twenty-one, or, being a daughter, should attain that age or marry, share and share alike; and if no children, then as the plaintiff Mary should, in manner therein mentioned, appoint; and in default of such appointment, then to the plaintiff Mary absolutely.

The cause was heard on further directions.

The *Solicitor-General*, Sir F. *Simpkinson*, Mr. *Temple*, Mr. *Swanston*, Mr. *Teed*, Mr. *Cooper*, Mr. *K. Parker*, Mr. *Walker*, Mr. *Wood*, Mr. *R. Palmer*, Mr. *Piggott*, Mr. *Stinton*, Mr. *Messiter*, Mr. *Chichester*, Mr. *Toller*, Mr. *Follett*, Mr. *Grenside*, Mr. *Giffard*, Mr. *S. James*, and Mr. *W. P. Murray*, appeared for the different parties.

The questions argued were as to the effect of the benefits which the six children had respectively received from or by means of their father, upon their respective shares, under the settlement of April, 1790; and whether, if those benefits, or any of them, were to be treated as conferred by way of advancement towards or in satisfaction of the portions or portion, the result was to increase the settlement fund for the benefit of the unadvanced children, the objects of that fund, or to constitute the father the purchaser of the portions of the children so advanced or benefited.

[The following among other authorities were referred to in the argument: *Noel v. Lord Walsingham* (1), *Bray v. Bree* (2), *Trimmer v. Bayne* (3), *Kirk v. Eddowes* (4), *Folkes v. Western* (5), *Smith v. Lord Camelford* (6).]

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For the purpose of deciding the effect to be given to the acts

(1) 25 B. R. 164 (2 Sim. & St. 99).

(4) 64 B. R. 390 (3 Hare, 509).

(2) 37 B. R. 172 (2 Cl. & Fin. 453).

(5) 7 B. R. 271 (9 Ves. 456).

(3) 6 B. R. 173 (7 Ves. 508).

(6) 3 B. R. 36 (2 Ves. Jr. 698).

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referred to in the Master's report, upon the interests of the children of Charles Johnson and Mary his wife, under the settlement of April, 1790, it will be convenient, in the first place, to put a construction upon the clause in the settlement, with reference to which the inquiries were directed.

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It would be difficult to put any construction upon that clause which should not be open to verbal criticism, or be attended with some anomalous results, unless Charles Johnson took the precaution fully to explain the views with which his acts were done. But I believe the true construction of the settlement requires that the first member of the clause should be read as applicable to acts or matters *inter vivos*, perfected in the lifetime of Charles, and the second member of the clause be confined to matters not perfected or not having effect until the death of Charles: this ascribes to the parties a probable intention, at the time of making the settlement. That Charles would, during his life, advance or pay money for or on account of the children of the marriage, for the mere purpose of support and maintenance, *and not of advancement or preferment, was certain. It was therefore provided that those advances or payments only which were made by Charles during his life, for or on account of the advancement or preferment in life of any of the children of the marriage, should be accounted as part or in full of their portions, under the settlement of April, 1790. But with respect to property of any kind coming to the children after his death, by devise, descent, intestacy, or otherwise, it was reasonable to consider and treat such property as, in whole or in part of, the provision intended by Charles for the child to whom it might be given, that is, for the same purpose as the settlement, leaving it to him, if his intention were otherwise, to make that apparent by contemporaneous explanation. Applying this principle of construction to the facts found by the Master, I must hold that the assignment of the leasehold to John by the indenture of the 10th of December, 1819, is not to be accounted for by him in part or in full of his share of the property comprised in the settlement of April, 1790. It is not so within the words of the clause; and the only question is, whether it can be held a satisfaction of a right under the settlement of April, 1790, by any general rule of law irrespective of the settlement; for this no argument or authority was offered. It is not a benefit or provision *ejusdem generis*. John will, therefore, take his share of the settled property, unaffected by the assignment of the leasehold premises.

The like observations apply to the leasehold property assigned to Francis by the indenture of the 21st of June, 1838.

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With respect to the 500 guineas agreed by Charles Johnson to be advanced to the plaintiff Mary Douglas, in order to enable her to apprentice one of her children *to a surgeon, as found by the Master, there are strong grounds for contending that that was money advanced or paid to Mary Douglas on account of her share of the property comprised in the settlement of April, 1790, if not (in terms) for her advancement and preferment; and if Mary Douglas, at the time of that agreement, and the subsequent advances in pursuance of it, had remained absolute owner of her share of the property comprised in the settlement of 1790, it would, perhaps, have been right to have accounted that 500 guineas as part of her share of the settled property. But, before the agreement in pursuance of which the 500 guineas was advanced, Mary Douglas had parted with her interest in her share of the settled property; and I cannot, as against the parties claiming under her, hold that any payment made to her is a satisfaction of their derivative claims under her, to the property comprised in the settlement of April, 1790. I give no opinion as to her liabilities to the estate of Charles in any other proceeding. All that I am required, or at liberty to do in this suit is, to determine to whom, and in what proportions, the property comprised in the settlement of 1790 now belongs.

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With respect to the property constituting one-sixth part of the residuary estate of Archdeacon Willes, and comprised in the settlement of the 31st of August, 1815, that property does not appear to me to be within the scope of the clause in the settlement of April, 1790, so as to affect the rights of the parties under that settlement. The finding of the Master in respect of that property I am bound to regard as a conclusion of law founded upon premises apparent in his report, and not the finding of a dry matter of fact. The property would have been the absolute property of Charles, if he had called it in, in which case it would have been part of his general estate, and subject to the clause in the settlement *of April, 1790; but unless and until he did so, it was not part of his estate, and would have survived to his wife, if he had died without reducing it into possession. In that state of the property, an arrangement, to which Charles was a party, appears to have been come to, in pursuance of which the settlement of August, 1815, was executed, by which the one-sixth of Archdeacon Willes's estate was intercepted. The property comprised in that settlement, therefore,

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never constituted part of the general estate of Charles; and, without any information, except that which is furnished by the settlement of August, 1815, I think I must deal with the property comprised in it as if it had been put into the state in which I find it by the will of Archdeacon Willes, or any indifferent person. Charles, who might have made it all his own, waived that right; and I do not see how the circumstance, that his consent was necessary to the arrangement, would justify me now in considering the property comprised in it as part of his estate, or as falling under the description of monies, goods, or chattels, descending or coming by or from him, within the terms of the settlement of April, 1790; unless it would have been so, if placed in that position by the will of Archdeacon Willes, or any other person.

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If the question were, whether independently of the clause in the settlement of April, 1790, the appointments made in pursuance of the powers given to Charles and Mary jointly, and to the survivor of them, under the settlement of August, 1815, were to be deemed satisfactions of portions given under the settlement of April, 1790, the proper answer would, in my view of the case, be in the negative, upon the ground that the provisions in the two cases were not derived from the same estate: *Roberts v. Dixall* (1), *Walpole v. Lord Conway* (2), and *Sir W. Davies'* *case, 5 Vin. Abr, 292, pl. 38; and I cannot think, that, in the settlement executed upon the marriage of the father in April, 1790, anything more was intended; certainly nothing more is necessarily expressed than to make provision for advances to come out of his own estate. It may be said, perhaps, that this construction makes the clause say no more than the law would have said without it. But so it is, as to the first member of the clause, at all events. I cannot say the point is free from doubt; but the conclusion I have come to appears to me to be right. My conclusion is, that neither the joint appointments of the husband and wife in January, 1821, nor the separate appointment of Mary in August, 1848, under the powers reserved by the settlement of August, 1815, have disturbed the rights of the parties under the settlement of April, 1790.

The only remaining question relates to the property given by the will of Charles, and here I am placed in considerable difficulty. The Master has found the will of Charles, but has not answered the inquiry which would have informed me what amount of property came under his will to his eight surviving children; and I am not,

(1) 2 Eq. Ca. Ab. 668, pl. 19.

(2) Barnard. Ch. R. 156, 157.

Therefore, in a condition to deal with this part of the case, unless I were prepared to hold that the property which came under the will of Charles is not within the scope of the settlement of April, 1790, or that I may safely disregard the case of *Folkes v. Western* (1); but to neither of these conclusions, in the abstract, am I prepared to come. The clause in the settlement of April, 1790, contemplates in terms Charles making a will; and I cannot narrow the word "come" in the settlement of April, 1790, so as to exclude from its operation property given by his will; but, in the application of the clause to the facts found by the Master, it appears to me that questions admitting of argument may possibly arise. With respect to the case of *Folkes v. Western*, I certainly doubt whether, if it were *res integra*, the case would be decided at the present day as it was decided by Sir WILLIAM GRANT in 1804, when the case of *Pitt v. Jackson* was not referred to (2); but it is now forty-five years since that case was decided, and many titles may now depend upon it; and if the present case were exactly similar to *Folkes v. Western*, I should feel bound to regard it as a case which ought not to be disturbed, unless by higher authority than mine. The present case is obviously less favourable than was the case of *Folkes v. Western* to the conclusion that Charles making an advancement to any of the children, thereby became a purchaser of such child's share, under the settlement of April, 1790. I make these remarks, however, only that the parties interested may not prosecute needless inquiries before the Master as to the estate of Charles.

The reference was not required by any of the parties, and the decree declared that the nine children who survived Charles, or those claiming under them, were entitled to one-ninth each of the trust fund comprised in the settlement of April, 1790.

DIXON v. PYNER.

(7 Hare, 331—333; S. C. 19 L. J. Ch. 402; 14 Jur. 217.)

Under a decree, directing the sale of an estate, but not directing by whom the sale shall be conducted, the Master is not bound to give the conduct of the sale to the plaintiff, but may, in his discretion, if he considers it more beneficial to the estate, give the conduct of the sale to other parties.

Grounds on which the conduct of a sale, under the decree of the Court, may properly be given to parties other than the plaintiff.

THE decree directed the sale of certain estates which had been vested in the defendants, the trustees, by trust deeds made in

(1) 7 B. R. 271 (9 Ves. 456).

(2) 2 Br. C. C. 51. See 3 B. R. 36.

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1839. Under these deeds the plaintiff was entitled to a portion of the proceeds of the sale, and the defendant Dixon to another portion. The decree for sale gave the plaintiff, and the defendants beneficially interested, liberty to bid; but such liberty, as to the plaintiff, was stated at the Bar to have been added to the decree by inadvertence, the plaintiff not requiring, and offering to waive it.

In carrying out the decree in the Master's office the Master gave the defendants, the trustees, the conduct of the sale, on the ground that, in his opinion, they were in a situation to conduct it more beneficially than the plaintiff, but without having that part of the decree which gave the plaintiff liberty to bid brought to his attention. The plaintiff objected to the course taken by the Master as to the sale, and moved that the conduct of the sale might be given to himself.

Mr. Lloyd and Mr. Shebbeare, in support of the motion, said, that it was the common practice, where it was not otherwise directed by the decree, that sales before the Master should be conducted by the plaintiff in the cause; and that there was no sufficient reason shown in this case for departing from the rule.

Mr. Wood and Mr. Elmsley, for the defendant Dixon, and *Mr. Hetherington*, for incumbrancers, opposed the application:

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Independently of the objection that the plaintiff had liberty to bid, the sale would be more beneficially conducted by the trustees, whose solicitor had prepared abstracts of the various parcels in the course of the attempts which had already been made to sell the property, and the expense would be greatly increased if the sale were now placed in other hands.

The Solicitor-General and Mr. Hislop Clarke, for the trustees.

THE General Orders L. and LL. of April, 1828, and *Dalby v. Pullen* (1) were referred to.

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It was in this case argued, that the Master had no power to take the conduct of the sale from the plaintiff, in the absence of any direction by the Court on the subject, or, at least, unless the plaintiff had been shown to be more or less in default, which, it was said, was not the case. I should have thought that the plaintiff

had waived his right to conduct the sale, by obtaining liberty to bid under the decree, and that in this case the trustees, and not parties having liberty to bid, should have the conduct of the sale. Although that point was not made before the Master, the Master has, in this case, given the conduct of the sale to the trustees. The sale of an estate is distinguishable from the common case entitling a plaintiff to the carriage of a decree which he has himself obtained. The question is, whether, the plaintiff not being in default, the Master had a discretion to give the conduct of the sale to any other party. Upon this point I have communicated with several of *the Masters, who are all clearly of opinion that they have such a discretion. They inform me, that, on being applied to for the purpose, they are in the habit of giving the conduct of sales, directed by the decrees of the Court, to parties other than the plaintiff, when that course is shown to be beneficial to the parties interested in the property. I shall not, therefore, alter what the Master has done in this case, on the ground of any want of jurisdiction to adopt the course which has been taken.

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I have no doubt that the Master has in this case proceeded upon safe grounds. The general rule of the Court, where a receiver has been appointed by the Master, and there is no question of property to be decided, but merely a question of discretion, is, not to interfere or disturb the Master's appointment, unless it can be shown that there has been an injurious exercise of such discretion. A like rule should apply to a case like the present. In the present case there were sufficient reasons for giving the trustees the conduct of the sale. It appears that ten years have elapsed since the trusts for sale were created, and in the course of that time several attempts have been made to sell the property. Abstracts have been prepared by the solicitors of the trustees, and from the nature of the property a great number of such abstracts has been required to show the state of the title. The trustees or their solicitor, having prepared these abstracts, and having the necessary knowledge of the state of the title, are in a condition, without further expense and delay, to lay it properly before the Master. The expense and delay which must result from adopting a different course would alone be a sufficient reason for not disturbing the decision of the Master.

BROMLEY *v.* WRIGHT (1).

(7 Hare, 334—346.)

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Real and personal estate was given to trustees, upon trust to pay the income to the testator's wife for her life, and within or at the expiration of ten years from the death of the survivor of himself and his wife, to sell and convert the same into money, and out of the income to pay annuities to several persons and classes of persons for the said term of ten years, with pecuniary legacies to the same persons and classes, and also to other persons, at the expiration of that time, and annuities to other persons for the lives of the annuitants, and specific legacies to others. The residue was then given to all and every the several legatees before named, (with exceptions,) rateably and in proportion to the amount of their respective legacies. The wife survived the testator: Held, that the "legatees before named" should be construed to be the legatees taking benefits out of the fund which fell in at the wife's death, and the "legacies" such legacies as remained to be satisfied at the expiration of the ten years.

That annuitants for life, not having other legacies, were legatees of shares in the residue.

That the specific legatees, including one taking a bequest of a watch, chain, and seals, were entitled to share in the residue according to the value of their respective legacies.

That annuitants, who survived the testator and died before the expiration of the ten years, when their pecuniary legacies were payable, took vested interests in such annuities and legacies.

That a class described as "the children" of B., but not otherwise named, came within the description of "legatees before named."

That the widow of the testator did not take under the residuary gift.

That the annuities which ceased at the expiration of the ten years, were not legacies in respect of which the annuitants took any share in the residue.

THE questions arose upon the will of Thomas Bromley, dated the 10th of February, 1825. The testator gave to his wife Rose Mary 500*l.*, to be paid to her by his trustees within two months after his death. He gave her his household goods, and other effects particularised in the will, which should be in his dwelling-house at Southampton at the time of his death; and also such part of his household goods and furniture and other effects in the parsonage at Bighton, as she might wish to select for her own comfort and convenience. And he gave to his trustees all his real and personal estate, upon trust to pay the income to his wife for life; and from and immediately after the decease of his wife, upon trust, within the space or at the expiration of ten years from the decease of his wife, or otherwise from his own decease, in the event of his surviving his wife, as the trustees in their discretion should think best, to sell and convert into money all such part of his real and personal estate as should not then consist of ready money and money in the funds,

(1) *In re Jodrell* (1889) 44 Ch. D. *Jodrell* [1891] A. C. 304, 61 L. J. Ch. 590; affirmed, *s. n. Seale-Hayne v.* 70, 65 L. T. 57.

and invest the proceeds in Government or real securities at interest. And he declared his will to be, that the income of the fund arising *from such conversion, and the rents, issues, and profits of his real and personal estate, until the conversion, should be held by his trustees for the purpose of answering and satisfying the several annuities and legacies thereafter bequeathed. The legacies after mentioned in the will were, amongst others, the following :

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1. To Mary Bromley, the widow of his brother Robert, an annuity or yearly sum of 100*l.*, for the term of ten years from the decease of the survivor of himself and his wife, for the joint use of herself and her daughter Agnes. And, in case of the death of either of them before the expiration of the ten years, then to the sole use of the survivor, her executors, administrators, and assigns. And at the expiration of the term of ten years he gave to Mary, if then living, the legacy or sum of 2,000*l.*, but, if she should be then dead, he gave the legacy of 2,000*l.* to Agnes, absolutely.

2. To Louisa Worthington Bromley, her executors, administrators, or assigns, an annuity of 50*l.*, for the same term of ten years ; and at the expiration of that term, he gave her 1,000*l.*, absolutely.

3. To his sister Elizabeth Bromley he gave an annuity or yearly rent-charge of 50*l.*, during the term of her natural life.

4. To his brother Henry he gave an annuity of 50*l.*, for the same term of ten years ; and at the expiration of that term he gave him a legacy of 1,000*l.*, absolutely.

5. To Margaret and Mary Cowley and the survivor of them he gave an annuity or yearly rent-charge of 50*l.*, for the same term of ten years, if they or either of them should so long live ; and at the expiration of the ten years, if either of the Cowleys should be living, the trustees were to lay out 500*l.* in the purchase of an annuity for their lives and the life of the survivor.

6. And he directed his trustees for the time being to *pay an annuity or yearly sum of 100*l.* to the person or persons having the care and protection of the four children of the late Major Bromley, for the same term of ten years ; and immediately after the expiration of the ten years he directed the trustees to pay to such of the four children as should then be living, the sum of 2,000*l.* equally between them on their attaining twenty-one, with maintenance in the meantime.

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7. To Stretch Cowley Bromley he gave his gold watch, seals, and chain, with an annuity of 200*l.*, for the said term of ten years, and a legacy of 3,000*l.* at the end of that time.

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8. To his old servant Mrs. Kennel an annuity of 10*l.* for her natural life.

9. A legacy of 300*l.* to John Heath, one of his trustees, payable at the expiration of the above-mentioned term of ten years.

The will then proceeded as follows: "And as to all the rest, residue, and remainder of the several trust-monies and premises which shall remain in the hands of my said trustees or the survivors or survivor of them, under the devises and bequests aforesaid, after duly satisfying and paying the several annuities and legacies hereinbefore bequeathed, I give, devise, and bequeath the same and every part thereof unto and between all and every the several legatees hereinbefore named, (except Elizabeth Ashley Bailey and her family, Mrs. Sly and her daughters, and Mrs. Kennel,) and that the same shall be divided and paid by my said trustees or the survivor of them to the several legatees, rateably and in proportion to the amount of the respective legacies bequeathed to them in and by this my will."

Henry Bromley died in the testator's lifetime.

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The testator died leaving his widow surviving. The *widow afterwards died; Mary and Agnes outlived the testator, and both died before the expiration of the ten years. At the expiration of the ten years two only out of the four children of Major Bromley were living.

On further directions the *Solicitor-General*, Mr. Teed, Mr. Temple, Mr. Wood, Mr. Blunt, Mr. Anderson, Mr. T. Parker, Mr. Follett, Mr. Leach, Mr. Dickinson, and Mr. Giffard, appeared for the different parties.

The authorities cited [so far as they are material to the decision, are referred to in the following judgment]:

THE VICE-CHANCELLOR:

The points which it is necessary to consider in this case are:

1. Of what does the residue consist? that is, does it include the real as well as the personal estate, and have the legacies of Mary and Agnes fallen into it or not? 2. Who are the residuary legatees under the will? 3. By *reference to which of the legacies given by the will, are the proportions in which the residue is to be divided amongst the residuary legatees to be ascertained, there being annuities and pecuniary and specific legacies? 4. Is any part of

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the residuary estate undisposed of, in the events which have happened? and, 5. To whom does the residue undisposed of (if any) belong?

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It would be difficult, if not impossible, to put a construction upon the entire will, for which a complete justification could be found in the very words of the testator. The case is one in which the construction of the will must be aided by reason and probability. Words admitting (possibly) of two constructions, must be read in that sense which is reasonable and probable, rather than in that which is unreasonable and improbable. But I believe the key to the interpretation of the will is to be found in this hypothesis: That the testator, in directing his residuary estate to be divided amongst the "legatees before named," refers to those legatees only to whom benefits are given out of the fund which fell in at his wife's death; and that, by the word "legacies" he means such benefits under his will as existed and remained to be satisfied at or after the expiration of the ten years. This construction, if not imperatively called for by the words of the will (which perhaps it is), is strictly consistent with them. It ascribes to the testator a reasonable and probable intention; it avoids the improbabilities which a different construction must ascribe to him; and it is, in my opinion, the sound construction of the language he has used. This construction will give to the legatees, to whom he gives legacies or sums of money at the end of the ten years, shares of the residue in proportion to the amount of their respective legacies, (properly so called,) excluding their annuities, which determined at the end of ten years, when those legacies became payable. It will entitle Elizabeth Bromley to a share of the residue, in proportion to the value of her life annuity at the expiration of the ten years; and it will exclude the widow of the testator from all share in the residue. The other points in the case will have to be decided upon different considerations.

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Upon the first point I am clearly of opinion, that the proceeds of the real estate pass by the residuary devise. With respect to the legacies of Mary and Agnes Bromley, who survived the testator, and died before the expiration of the ten years, I think (though not without hesitation) that their legacies were vested, and not contingent upon their outliving the term of ten years. The annuity is absolute for ten years, whether they live for that time or not, and the gift of the legacy takes effect when that annuity ceases. The words of contingency are obviously introduced with a view to

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provide for a case between Mary and Agnes, and not between them and the estate. The postponement of the legacy is for the convenience or supposed convenience of the estate, and is not personal to the legatees, and the gift of the shares of Mary and Agnes of the residue is vested. *Batsford v. Kebbell* (1) is plainly distinguishable; there the gift of the dividends was determinable if the legatee died under thirty-two: here the annuity continues until the legacy is payable; and it is a circumstance not undeserving of attention, that the annuity is the exact amount of the interest of the legacy at 5l. per cent. I think that their legacies are given by way of substitution for the annuity, and have not fallen into the residue.

There is no question that the residue will be increased by the lapse of Henry's legacy, as he died in the lifetime of the testator.

[340] Secondly, one set of legatees sought to be excluded are the children of Major Bromley. The argument was, that the residue was given to the legatees "named" in the will, and it was said that the children of Major Bromley were described and not named. To that argument I cannot accede. The legatees named means the persons to whom the legacies are given. I cannot adopt a distinction so refined as that.

The next case is that of the annuitant for life, Elizabeth Bromley. That the testator intended her to share in the residue is in the highest degree improbable. Throughout his will he speaks both of legacies and annuities. The legacies he calls "legacies or sums of money;" the annuities he calls "annuities or yearly sums." In the case of the Cowleys, he substitutes a legacy of 500l. for their annuities. In the case of Elizabeth, he makes no substitution, but leaves her in possession of an annuity for life. And he uses the word "amount," by which to measure the proportion of the residue which his residuary legatees are to take, a term not applicable to an annuity. But against this I must set the established proposition, that, in a case of this description, annuities are legacies unless the context of the will shows that such was not the intention of the testator: *Nannock v. Horton* (2), and *Sibley v. Perry* (3). But the exception in the residuary clause of Mrs. Kennel from the legatees enforces by the very words of the testator the sufficiency of the word "legacy" to include the annuity.

(1) 4 R. R. 15 (3 Ves. 363).
(2) 7 Ves. 391.

(3) 6 R. R. 183 (7 Ves. 522).

By excepting an annuity for life from the legatees, to whom he gives the residue, he declared that an annuity for life is in his vocabulary a legatee of a share of the residue; and I cannot think that the word "amount," though in strictness *inapplicable to annuities, is of such unbending force as to justify me in excluding from a share of the residue an annuitant who would otherwise be entitled to share in it: *Nannock v. Horton* (1). This annuity, it will be observed, is a life annuity, and existed at and after the expiration of the term of ten years, and had to be satisfied out of the estate from the expiration of the term to the death of Elizabeth.

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The specific legacy which is given to Stretch Cowley Bromley in the residuary clause must be governed by the same consideration.

The next question is, whether the wife is to share in the residue. That such was the intention of the testator cannot be imagined. His estate is not to be converted for the purpose of division as residue, until, possibly, ten years after his wife's death. In making the disposition of the residue he contemplates the event of her dying before himself, but makes no disposition of any share of residue supposed to be given to her. In the event of her surviving him, he gives her a life interest in the whole of the property, which at her death constitutes or (more correctly) includes that which is directed to be divided as residue. These observations I admit are not absolutely conclusive. If the widow survived the testator, she was no doubt capable of taking an interest in the residue, though not payable until ten years after she was dead, and the circumstance that she took a life interest in the residue is not absolutely sufficient to exclude her from taking a share of the fund in which she is tenant for life. But the improbability that such can have been the intention, and the circumstance that her legacy of 500*l.* was plainly given as income *to meet the exigencies of the first months of widowhood, raises a question whether, according to a sound construction of the will, the legacies referred to in the residuary clause as measures of shares of residue, are not those legacies only which the testator gives after his wife's death. I put this as a question of construction—Can a testator who uses such language, in such circumstances, be understood to include his wife (the tenant for life) as a residuary legatee? I think not. But I think further, that the legatees named in the residuary clause are plainly exclusive

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(1) 7 Ves. 391, where a special context "shut out all conjecture": *per* Lord ELDON.

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of the wife. "The legatees hereinbefore named" are the same as those to whom, in the preceding line, he refers as persons to whom "the several" annuities and legacies thereinbefore bequeathed were given. But these are the same whose annuities and legacies were to be paid out of a particular fund; and that particular fund was the fund with which the testator deals after his wife's death, and that fund was exclusive of his wife's legacy.

The case of Louisa Worthington Bromley raises the third question. She is one of a comparatively numerous class, to whom the annuities are given for the term of ten years, and, at the expiration of that time, a gross sum of money, i.e., a legacy, properly so called, is substituted for it. The legacy follows the annuity. They have no concurrent existence. And it is observable, that, in the greater number of cases, (not in all) the annuity is the exact amount of the interest at 5*l.* per cent. of the sum which is substituted at the expiration of the ten years. The postponement of the division of the residue for a term of ten years is for the convenience or supposed convenience of the estate, and when the division takes place the annuity ceases. Can it, in such case, be understood, without the most direct words, that a testator who, for the convenience of his

*estate, postpones the division of his residuary estate, and gives an annuity during the postponement, and, the period of division arrived, substitutes a legacy for the annuity, refers to anything but the substituted legacy, where he uses the words of this will? Can it be that his words refer to an interest past and determined, where he actually provides a substitute for it, to which the words of the will naturally apply? Apply this question to the case of the widow, and suppose her legacy of 500*l.* to entitle her to a share of the residue,—can it be supposed that the testator intended that, in computing her share of the residue, the value of her life interest in the residuary estate (which, by the supposition, had determined for ten years) should be taken into account? Yet to this length the argument must go. I confess, I have so much difficulty in believing that the testator who does, in a sense, continue the annuities by giving the value of them in a substitution of a gross sum, could have contemplated a retrospective valuation of the expired annuities as the measure of the interest of his legatees in his residuary estate,—and the opposite construction ascribes to him so natural and probable an intention,—that I cannot hesitate to say that such, in my judgment, is the sound construction of the word "legacy" in the residuary clause. If it were not for Elizabeth Bromley's legacy.

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this point in the case could scarcely admit of an argument. The difference, however, between her case and that of Louisa Worthington Bromley is this,—that in Elizabeth's case (the Court being forced to treat the annuity as a legacy) there is nothing but the annuity to refer to by which the words of the will can be satisfied, and her legacy has continued after the ten years. In the case of Louisa Worthington Bromley a legacy properly so called has been substituted for it, and the annuity has ceased. I think, by excluding the annuity, I am construing the *words of the will in their natural and proper sense, although, possibly, they may admit of a different construction.

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The fourth question applies only to Henry Bromley's legacy. Henry was a legatee of residue in proportion to the amount of his legacy, which lapsed by his death in the lifetime of the testator. The question is, in what way is his contemplated share in the residue to be dealt with? The argument on one side was, that his share of the residue is undisposed of, according to the common rule in the case of a tenancy in common of residue. The argument on the other side was, that the legatees to whom the residue was given were those who survived the testator. No case was cited. I think the former is the sounder argument, and that the share is undisposed of. The will speaks from the death of the testator; and if the testator chooses to give the share of his residue to a dead man, that share is undisposed of. If the gift had been to A., B., and C. equally, and A. had died in the lifetime of the testator, there would be no question. Why should the decision in this respect be altered, because, in order to favour one party more than another, he gives them legacies of different amounts, and directs the residue to be divided amongst them in proportion to those legacies?

Upon the fifth point I must adhere to what I said in *Fitch v. Weber* (1). It is no new opinion which I then expressed, and the parties appear to have been satisfied with the decision.

(1) 77 B. R. 56 (6 Hare, 145).

1849.
March 22, 23.
April 24.

KIRWAN *v.* DANIEL.

(7 Hare, 347—351.)

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V.-C.
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The Court may proceed with a cause so far as a final order can be made, notwithstanding the absence of an interested party who is out of the jurisdiction; but where the suit was brought to enforce a charge upon the produce of the estate of an absent party, in the hands of his agents and consignees, in performance of an agreement to which the consignees were parties, the COURT refused to direct an account to be taken of the amount of the produce received by the consignees; for, as the absent party would neither be bound by the account of what was due to the plaintiff in respect of the charge on the estate, nor be compelled by the decree for payment of what was so found due, to allow in the accounts of his consignees the payments to be made by them in pursuance of the decree, the accounts of the receipts of the produce of the estate by the consignees could not be taken for any final purpose.

It is not an objection to a decree for one purpose, that it may involve the necessity of taking an account, which account it may possibly be necessary to take in another suit for another purpose.

THIS case is reported on the demurrer of Messrs. Daniel & Co. (1). The bill was afterwards amended, by making Messrs. N. and H. Mayo defendants, and by adding the alternative prayer, that, in case the Court should be of opinion that the said defendants Daniel & Co. were not liable in all events to the payment of the said annuity during such time as they had been or should be in the receipt of the said consignments, but only to the extent of any surplus of the produce of the said consignments remaining after payment of the expense of the proper cultivation and maintenance of the said estates, or other payments, then that the amount of such surplus might be ascertained under the direction of the Court, and that all proper accounts might be taken for that purpose; and that, in taking such accounts, the said defendants Daniel & Co. might be disallowed all sums claimed by them to be allowed in priority to the said annuity which should not appear to have been paid for or towards the proper cultivation and maintenance of the estates.

The Solicitor-General and Mr. Hetherington, for the plaintiff.

Mr. Rolt and Mr. Dickinson, for the defendants Daniel & Co.

Mr. Stinton, for the defendants N. and H. Mayo.

[348] THE VICE-CHANCELLOR :

In this case the bill is filed by Mr. Matthew Kirwan to recover the arrears of an annuity which are charged upon an estate in

Montserrat, of which estate the Daniels are consignees. The owner of the estate is John Francis Kirwan, and the plaintiff's claim to have his annuity paid by the Daniels arises out of an agreement made between John Francis Kirwan and the Daniels, under which the Daniels were to be consignees of the whole produce of the estate, and were to accept bills, and send out supplies, and, amongst other things, also to pay the plaintiff's annuity. I was of opinion, and still am, that the plaintiff, by the communications between the different parties, had acquired a right to enforce in his own favour that provision which originally could only be enforced by John Francis Kirwan. However, one objection taken to the relief prayed was, that John Francis Kirwan, to whom the plantation belongs, was stated and proved to be out of the jurisdiction, and consequently that the Court could not make a decree in the plaintiff's favour in the present state of the record. I would not trust myself to decide that question until I had actually written my judgment upon the merits of the case. If, when I have stated what I have to say upon the question of parties, counsel desire to know my view of the case upon its merits, which, as I have had occasion twice to consider the case, I am not very likely to change, I will read it. But I am sorry to say I have come to the conclusion, that, in point of form, I cannot resist the objection for want of parties, which arises from John Francis Kirwan being out of the jurisdiction.

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DANIEL.

With respect to the objection for want of parties, Lord REDESDALE says, that "the Court will proceed without *him" (that is, without an absent party) "against the other parties as far as circumstances will permit" (1); and adds, "If a person so out of the power of the Court, is required to be an active party in the execution of its decree, as where a conveyance by him is necessary, or if the decree ought to be pursued against him, as the foreclosure of a mortgage against the original mortgagor or his representative or assign, the proceedings will unavoidably be, to this extent, defective." In *Brown v. Blount* (2) a judgment creditor of Sir Charles Blount sought to enforce his rights against the property of Sir Charles Blount in the hands of trustees. Sir Charles Blount was out of the jurisdiction of the Court. Sir JOHN LEACH said, that, Sir Charles Blount being the person whose interests were sought to be affected by the decree, the suit could not proceed in his absence. The rule

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(1) Lord Redesdale, Tr. Pl. 164, (2) 2 Russ. & My. 83.
4th ed.

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of the Court then appears to stand thus: The Court in general requires that all persons interested should be parties to the suit. But where a sufficient reason is alleged and proved for proceeding in the absence of an interested party, the Court will proceed in his absence as far as it can make a final order, attending to this, that he will not be bound by proceedings had in his absence. If the legal estate be in the absent party, and a conveyance of the legal estate is necessary, a decree in his absence cannot be made. If a foreclosure be the object of the suit, the suit cannot proceed to a decree in the absence of the mortgagor, for such a decree, in his absence, would be merely nugatory. In *Brown v. Blount* Sir JOHN LEACH thought, that, as the object of the suit was to affect the interest of Sir Charles Blount, the suit could not proceed in his absence. If, in this case, the only objection were founded upon the consignees' accounts, and there were any purpose for which those accounts *could finally be taken in this suit in the present state of the record, I should not hesitate to proceed in the absence of John Francis Kirwan. The objection (as expressed in terms) was, that an account of the consignments taken in his absence will not bind him, and that an account of the same consignments may have to be taken a second time against the Daniels at his suit. The objection, as expressed, alone, would not, I think, be a sufficient reason why the account should not be taken in his absence, if I could decree payment in his absence. The single object of this suit is to enforce payment of the arrears of the plaintiff's annuity. Another suit for a different purpose, that of taking a general account of the consignments, may perhaps be necessary, and may involve a repetition of the accounts taken in this suit. But I cannot consider that it is an objection to a suit for one purpose, that it may require an account to be taken which may also be necessary in another suit for another purpose.

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But my difficulty is this: whatever claim for the arrears of the annuity the plaintiff may establish in this suit, the Daniels must (*ex debito justitiæ*) be allowed the same in the consignees' accounts against John Francis Kirwan; but if John Francis Kirwan is not a party, he will not be bound by the account taken of the arrears of the annuity and may possibly resist the payment of the annuity in his account with the Daniels. To that extent, therefore, the proceedings in the absence of John Francis Kirwan would not be to any extent final. If I cannot go on to direct the payment of the annuity, if I cannot take the account of the arrears due in the

absence of John Francis Kirwan so as to bind him, the accounts would be taken for no useful purpose.

The cause must stand over, with liberty to make John Francis Kirwan a party.

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PELLEY v. WATHEN.

(7 Hare, 351—376; S. C. 18 L. J. Ch. 281; 4 Jur. 9; *affd.* 1 D. M. & G. 16; 21 L. J. Ch. 105; 16 Jur. 47.)

[AFFIRMED on appeal as reported in 1 D. M. & G. 16.]

1849.
March 8, 9,
15, 30.
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V.-C.
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SAYER v. SAYER.

INNES v. SAYER.

(7 Hare, 377—390; *aff.* 3 Mac. & G. 606.)

[AFFIRMED on appeal as reported in 3 Mac. & G. 606, under the title of *Innes v. Sayer.*]

1848.
Feb. 8, 9, 10.
March 3, 21.
1849.
March 22, 24.
April 28.
[377]

PRICE v. BERRINGTON.

(7 Hare, 394—410; on app. 3 Mac. & G. 486; 15 Jur. 999.)

[REVERSED on appeal as reported in 3 Mac. & G. 486.]

1849.
Feb. 23, 24.
March 7.
May 5.
WIGRAM,
V.-C.
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LUCAS v. JAMES.

(7 Hare, 410—426; S. C. 18 L. J. Ch. 329; 13 Jur. 912.)

On a treaty for an under-lease, a memorandum of the terms of the intended agreement was prepared, stipulating that the lease should contain all usual covenants, and also the covenants in the leases of the ground landlord, and the proposed lessee signed the memorandum, accompanying his signature by the qualification that he agreed thereto, subject to there being nothing unusual in the leases of the ground landlord. A draft of the proposed lease was afterwards submitted by the lessor's solicitors to the proposed lessee, who made some alterations and returned the draft with a request that the lessor would at once grant the lease as altered, or refuse it. The lessor's solicitors sent the draft back the same day, assenting to all the alterations except one, whereby the proposed lessee had expunged a clause in the draft restraining any assignment or demise by him without the consent of the lessor: Held, that, upon the return of the draft lease, not acceding to all the alterations, and in the absence of any proof that the lessor was previously bound by the terms as to unusual covenants, introduced by the proposed lessee on his signing the memorandum, the

1849.
Feb. 27.
March 1, 2.
April 18.
WIGRAM,
V.-C.
[410]

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contract was incomplete, and the proposed lessee was at liberty to determine the treaty.

Whether the existence of a nuisance in the neighbourhood of a house contracted to be purchased for a residence, which nuisance is known to the vendor, and is one which a provident purchaser could not discover, is a ground for refusing a decree for specific performance of the contract: and whether otherwise, if the nuisance be not known to the vendor, *quære* (1).

A signature in pencil is not necessarily deliberative, and may be equally binding on the party making it as the signature, if written in another manner, would be.

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A suit for the specific performance of an alleged agreement for an under-lease. The defendant denied *that any agreement had been concluded; and insisted, moreover, that, even if any such agreement had been signed, it had been done without a knowledge of circumstances existing at the time, affecting the property, and rendering it impossible that he (the defendant) could have the benefit of the contract for the only purpose for which he had intended to enter into it, and for which alone the plaintiff, or her agents employed in the treaty, knew that he had intended to enter into it.

Mr. Wood and Mr. Glasse, for the plaintiff.

The Solicitor-General, Mr. Lloyd, and Mr. Elmsley, for the defendant.

On behalf of the defendant, it was argued, that there was no acceptance by the defendant of the terms offered on behalf of the plaintiff. [*Doe d. Perkes v. Perkes* (2), *Stratford v. Bosworth* (3) and other cases, were cited on this point.]

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On the part of the plaintiff, it was contended, that the agreement, at least to a certain extent, had been actually made; and the circumstance of variations having been intended, which were not made, did not render an agreement nugatory so far as it had actually been made: *Duncuft v. Albrecht* (4); that a clear assent to certain terms was sufficient, even if differently understood: *Kennedy v. Lee* (5). * * *

On the question, whether, if the contract were to be taken as complete, the Court would interfere, looking to the unsuitableness of the property for the purposes of the defendant, the cases of *Drewe v.*

(1) On this point see *Hope v. Walter*
[1900] 1 Ch. 257, 69 L. J. Ch. 166, 82
L. T. 30, C.A.

(2) 22 R. R. 458 (3 B. & Ald. 489).

(3) 23 R. R. 229 (2 V. & B. 341).

(4) 56 R. R. 46 (12 Sim. 189, 198).

(5) 17 R. R. 110 (3 Mer. 441).

Hanson (1), *Smith v. Marrable* (2), and *Shirley v. Davies* (3), were cited; and it was observed, that specific performance had been decreed, although the premises had, in the interval, been destroyed by fire. On the consequence at law of defects in the subject of the contract, not known to the vendor: *Early v. Garrett* (4) and *Taylor v. Ashton* (5); or, known to the vendor but not to his agent: *Cornfoot v. Fowke* (6) and *Fuller v. Wilson* (7); and in *equity, of defects known to the vendor or his agent: *Gibson v. D'Este* (8), *S. C. Wilde v. Gibson* (9).

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[Authorities were also cited upon other points which arose and were argued in the case, but were not the ground of the decision, viz.: That a covenant against alienation by the lessee is not an usual covenant: *Church v. Brown* (10); and that the title of the lessor must be shown: *Fildes v. Hooker* (11).]

THE VICE-CHANCELLOR:

The plaintiff is lessee for years, under Sir Richard Sutton, of a house, No. 57, Curzon Street, with the yard or garden at the back. The property is derived under two leases, and, as I understand, (for it does not, I think, appear upon the pleadings,) the yard or garden, or some part of it, is part only of the parcels comprised in one of the leases. The residue of the parcels comprised in that lease is now vested in third persons not before the Court. The covenants in both leases, *mutatis mutandis*, are the same; and amongst them is a covenant empowering the landlord to enter and determine the lease upon breach of any of the covenants. In January, 1848, the defendant agreed or treated for a lease, for seven, fourteen, or twenty-one years, of the house and premises. The treaty had terminated, or was on the point of terminating in an agreement, when the defendant made a discovery respecting the houses in the neighbourhood which made it impossible that he could use the house as a residence for his family, the purpose for which *alone he wanted it. Upon this, on the 17th of January, 1848, he wrote to the plaintiff's solicitors, declining to accept a lease of the house in question. The bill has since been filed, and

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| (1) 6 Ves. 675; see 17 R. R. 46, n. | (8) 60 R. R. 262 (2 Y. & C. C. C. 542). |
| (2) 63 R. R. 493 (11 M. & W. 5). | |
| (3) 1 Br. C. C. 440, n. | (9) 73 R. R. 191 (1 H. L. C. 605). |
| (4) 33 R. R. 371 (9 B. & C. 928). | (10) 10 R. R. 74 (15 Ves. 258). |
| (5) 63 R. R. 635 (11 M. & W. 401). | (11) 2 Mer. 424 (see now Vendor and Purchase Act, 1874 (37 & 38 Vict. c. 78), s. 2). |
| (6) 55 R. R. 655 (6 M. & W. 358). | |
| (7) 3 Q. B. 58. | |

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the main question in the cause is, whether, at the time of writing the letter of 17th January, 1848, the defendant was bound to accept a lease from the plaintiff, or not.

The facts necessary to raise the question are these: The plaintiff employed Mrs. Marsh, a house agent, to let the house for her. A Mr. Lofts was the clerk of Mrs. Marsh, and was the person who negotiated the matter personally with the defendant. Messrs. Fyson & Co. were the plaintiff's solicitors. The defendant had no professional assistance (except his own) before the 17th of January, 1848. On or about the 7th of January, Lofts (on the part of the plaintiff) and the defendant had come to general terms, upon which the plaintiff was willing to let, and the defendant to accept a lease of the premises. A memorandum, intended to express the terms of this agreement, was prepared by Lofts, signed by the plaintiff, and tendered to the defendant for his signature. After some discussion between Lofts and the defendant, it was arranged that a more formal agreement should be prepared by Lofts. This accordingly was done, and, on the 8th of January, Lofts again saw the defendant, and tendered the new memorandum for his signature. The memorandum is as follows:

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“Memorandum of agreement made and entered into this 7th day of January, 1848, between Flora Lucas, of &c., of the one part, and William Milbourne James, of &c., of the other part. The said Flora Lucas hereby agrees to grant a lease for twenty-one years, (with the option, on the part of the said W. M. James, of determining the same at the expiration of the first seven *or fourteen years), of the house and premises, No. &c. (The memorandum expressed that the rent was to be 180*l.* a year, and that W. M. James thereby agreed to accept the said lease, which was to contain all the usual covenants and also those covenants expressed in the lease from Sir R. Sutton to the said Flora Lucas, and to pay the said rent free of all rates, taxes, or assessments, except the land-tax; and also to pay the insurance duty and premium, and the expense of the lease and counterpart,—Flora Lucas to pay the ground-rent to the freeholder, and rates and taxes to the 9th of February next; W. M. James to purchase for 20*l.* certain fixtures therein mentioned, to be paid, on taking possession, to Mrs. Marsh, on account of Flora Lucas.) In witness whereof, said parties have hereunto set their hands, the day and year first before written. N. B. It is understood that the fixtures now upon the premises are to be scheduled to the lease and left for the use of the said W. M. James,

who will deliver same up, at the expiration of his tenancy, in as good condition as they now are."

The writing occupies two pages, leaving a small space, sufficient, and perhaps not more than sufficient, for the mere signature of the parties and the attestation of a witness. The defendant, after reading the memorandum in the presence of Lofts, wrote in pencil, on the third or fly-leaf of the memorandum, opposite or nearly opposite to the place left for the signatures, the following words: "I have no objection to this agreement, supposing that there is nothing unusual in Sir R. Sutton's leases, which I presume there is not. W. M. J." And afterwards, at the instance of Lofts, wrote the following words, also in pencil, immediately below what he had previously written: "I agree to these terms, subject to the above observations: W. M. JAMES;" and gave the paper to Lofts, who took it away with him, and gave it to Messrs. Fyson & Co., who prepared a draft lease, and, on the 14th of January, sent it to the defendant, with a letter of that date, in the following words: "We beg to send you herewith the draft of the lease of the house, No. 57, Curzon Street, which we have prepared in accordance with your agreement with Miss Lucas. The schedule of fixtures is not quite ready, but shall be sent in the course of to-morrow."

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On the 15th of January, 1848, the defendant returned the draft lease with sundry alterations in and remarks upon it, in his own handwriting, and with his name and initials subscribed thereto, and accompanied by a letter, stating that he returned them the draft with some alterations; adding, "he has only altered the draft in matters which he considers essential, and he must beg, therefore, that the lessor should at once grant him the lease as so altered, or refuse to do so."

Messrs. Fyson & Co., on the receipt of the letter, on the same day returned the draft to the defendant, with their remarks thereon, and accompanied by a letter as follows:

"January 15th.

"SIR,—We send you this draft lease again, which we have altered and modified with reference to your remarks. The covenants as inserted by us precisely correspond with those contained in our client's lease from Sir R. Sutton, but we have endeavoured to alter them to meet your wishes. Our client is quite prepared to complete the matter on our agreeing the terms of the lease.

"We are, &c.,

"FYSON, CURLING, AND HOPE."

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The result of these communications between Fyson & Co. and the defendant (as I understand it), was, that Fyson & Co. submitted to all the alterations which the defendant required in the draft lease, with a single exception, which was this : The draft, as prepared by Fyson & Co., prevented the defendant from assigning or underletting the premises without licence, whereas the defendant required that his power to assign or underlet should be unconditional. This Fyson & Co. declined. In this state the matter was on the 17th of January, 1848.

On the 17th of January the defendant wrote the following letter, thereby finally determining the agreement :

“ Mr. James presents his compliments to Messrs. Fyson & Co., and regrets that he is under the necessity of breaking off the negotiation for a lease of the house No. 57, Curzon Street. Independently of the objections to the draft proposed, and to the lease from Sir Richard Sutton, under which Miss Lucas is stated to derive her title, and which would themselves prevent Mr. James from taking the lease, he thinks it right to add, that he has just received such information as to the character of several houses immediately around, as to render it quite out of the question to take the house for a family residence.”

Some further communications took place between Fyson & Co. and the defendant, in which they abandoned the only point then in controversy between them as to the terms of the draft lease, and insisted that the defendant was not then (on the 17th of January, 1848), in a condition to refuse to accept the lease.

[*418] The plaintiff, by her bill, prays the specific performance *of the contract which she alleges has been made, and insists also, that the defendant has waived his right to inquire into the landlord's title.

Several points are made by the defendant. First, that, on the discovery of the character of certain houses in the immediate neighbourhood of the house the subject of the treaty, he had a right to abandon the agreement if it had been made. I wish authority could have been produced in support of that proposition, for it is plain that the defendant must suffer, and that seriously, if the contract is to be enforced in equity. The law, as stated by Sir EDWARD SUGDEN, respecting defects in the subject of a contract, (and I believe correctly), is this : that if the vendor, at the time of the contract, does not know of the existing defect in the estate, the Court will enforce the contract ; otherwise, perhaps, if the defect be known to the vendor, and be one which a provident purchaser could not

discover. I presume the law is the same where the value is affected by a nuisance in the neighbourhood. The hardship of the position of the defendant would be this: that he would be compelled to accept a lease with a present knowledge of a defect, which knowledge he may be bound to disclose to a purchaser or lessee under himself. Legal reasons may, however, be adduced in support of this state of law, and the utmost weight I can give to the consideration of the point in the present case is this, that I must, on behalf of both parties, try the case, in other respects, strictly between them.

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The second point made by the defendant was, that there was no signature by him to the alleged agreement, within the Statute of Frauds; that, so far from the memoranda being considered or intended to be conclusive, the negotiation had been subsequently carried on as to *the land tax, fixtures, and other matters, and that the memoranda had been made by him in pencil, because they were not intended to be binding until the covenants in Sir Richard Sutton's leases had been examined.

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To the statement in the defendant's answer upon that subject I give entire credit; but can I bind the plaintiff by that which may truly have passed in the defendant's mind, but which cannot be said to have been matter of agreement or stipulation between himself and Lofts? I think not. If that which was written in pencil had been written in ink, and Lofts had been dead, and nothing more had passed or nothing more was known except what the paper itself found in the plaintiff's possession discloses, or if Lofts had been out of the way, and the plaintiff had acted for herself, could I have said that the defendant had not made the agreement which the paper contains, and had not authenticated the agreement by his signature? The first pencil memorandum may be considered as deliberative; but the second leaves no room for doubt or question as to the meaning which must be attributed to the party who wrote it. The words, "I agree" &c., standing alone, would, in general, be conclusive, but they acquire additional force by the juxtaposition. The party who wrote the words "I agree" &c., must be deemed to have intended something more than the previous words express. A paper of such a character, found in the possession of the lessor, must *primâ facie* bind the defendant. The only question then is, whether the circumstances that the writing of the defendant is in pencil, and the evidence of Lofts, and the letters of Fyson & Co. before the 17th of January, and the answer,

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together furnish ground for depriving the plaintiff of the benefit which the document alone would, in my opinion, give her. I think not. Indeed, the letters support the construction *I put upon the document, and if the case rested here, my judgment would, I think, be with the plaintiff.

The third and next question requires a very grave consideration. The defendant says, that the first pencil memorandum to which he annexed his initials, introduced a material variation into the memorandum of the 7th January, which was tendered to him for his signature by Lofts. He says, that Lofts had no authority to assent to such variation, and that the memorandum, with such variation, although signed by him, was nothing more than a proposal on his part for the plaintiff's acceptance or rejection, and that, until the plaintiff had assented to the variation, she was not bound by the act of Lofts; that there was not, in fact, any agreement between the plaintiff and the defendant. He says, in effect, that when, on the 8th of January, he gave the memorandum to Lofts, with his pencil additions thereto, he had rejected the plaintiff's proposal, and made a different proposal of his own; and that, until the plaintiff had acceded to his terms, there was no agreement between the plaintiff and him. He had proposed and signed terms only; but, without the plaintiff's accession to those terms, there was no agreement. The point is made by the answer in the following terms. After giving the defendant's account of his interview with Lofts, upon the occasion of the pencil memoranda being added, he proceeds: The "said Henry Lofts then stated that he would show what defendant had written to plaintiff and to her solicitors, and that the original lease should be sent for the defendant's perusal immediately; but defendant saith he was never informed, and he is not aware, that the plaintiff ever assented to the alleged agreement with the conditional term as to the contents of Sir R. Sutton's lease, which the defendant had introduced therein; and defendant doth not believe that the plaintiff *ratified or consented to such alteration before the defendant had altogether repudiated the agreement and declined to take the house on lease, as after mentioned." The words, "as after mentioned," refer to the letter of the 17th of January, 1848. In another part of the answer the word "proposal" is used, with reference to the legal effect of the memorandum, with the pencil additions.

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If the defendant is right in his premises, that is, if the memorandum with the pencil additions was a mere proposal signed by the

defendant for the plaintiff's acceptance or rejection, and if the plaintiff had not acceded to it before the 17th of January, the defendant's conclusion is, I think, correct. For, upon that hypothesis, when the defendant wrote the letter of the 15th of January, there was no agreement: the case still rested in proposal. In that letter the defendant says, "My terms appear upon the draft lease, and I require the plaintiff to assent to or refuse them." The assent was by Fyson & Co.'s letter of the same day, qualified as to a material covenant; and this, according to the case of *Holland v. Eyre* (1) left the defendant at liberty. Nothing more passed before the letter of the 17th of January, 1848. It becomes necessary, therefore, to examine the premises upon which the defendant's conclusion is founded.

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If I were at liberty to speculate, I should hazard the conjecture, that, between the 8th and the 17th of January, the plaintiff had been informed of what had passed between Lofts and the defendant on the 8th, and that she adopted the acts of Lofts, as her agent. I should so conjecture, because I find from a passage in the answer, *which was not read in evidence (and, if read, would not prove the fact), that Lofts, between the 8th and the 14th, (I infer these dates from the transactions alluded to,) that Lofts, in the course of that interval, told the defendant that the plaintiff had desired him (Lofts) to go to the solicitors, to say that they were not to make any difficulties about the covenants, and not to insist upon any covenants that were not absolutely necessary; and that he had instructed the solicitors accordingly. But whatever my conjectures on that subject may be,—if it be necessary that the plaintiff should prove an actual acceptance on her part of the terms offered after the 8th,—I cannot, upon the pleadings and evidence now before me, hold that such was the case, and make a decree in the plaintiff's favour. The point is prominently put forward in the answer, as a substantive ground of defence to the bill. The *onus* lay upon the plaintiff. The witnesses to prove it were Lofts or the solicitors, the former of whom has been examined by the plaintiff, but no evidence is given on the point. As far as actual evidence goes, the point is with the defendant.

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That this point in the defendant's case cannot be considered as disposed of in argument, without inquiring whether Lofts, or the

(1) 2 Sim. & St. 194. [Elementary law; for recent examples see *Jones v. Daniel* [1894] 2 Ch. 332, 63 L. J. Ch. 562; *South Hetton Coal Co. v. Haswell, &c. Coal Co.* [1898] 1 Ch. 465, 67 L. J. Ch. 238, C.A.—F. P.]

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solicitors (who clearly adopted Lofts' acts, had not an implied authority to conclude an agreement with the defendant on the plaintiff's behalf, with the variation introduced by the pencil memorandum. The question may be thus stated: whether, if the plaintiff had authorised Lofts to sign the memorandum of the 7th of January on her behalf, upon the same being signed by the defendant, Lofts had not an implied authority to bind her, by signing the same, with the pencil additions thereto. To try this, I begin by assuming the variation to be substantial, and that the defendant had filed his bill to enforce such an agreement, *on the 8th of January, before anything more had passed; and the plaintiff in this suit had met the bill by a plea, which neatly raised the question, whether Lofts had implied authority or not to dispense with the covenants in Sir Richard Sutton's leases. How did that matter stand on the 8th of January? Whether usual or unusual, the proviso for re-entry for breach of any covenant made it indispensably necessary to the plaintiff, as well as the defendant, that those covenants should be inserted in any lease the plaintiff might grant. The lessee might well look into the original leases before he agreed to accept a lease of the property in them; but his lease must contain those covenants, or, at all events, he must observe them. The plaintiff could not do otherwise than insist upon the insertion of the covenants, whether usual covenants or not.

If, then, on the evening of the 8th of January, the plaintiff had been informed of the conditional contract which Lofts had made, might she not have said, "I have no power to dispense with, nor could the defendant accept of a dispensation from any of the covenants in Sir Richard Sutton's lease, whatever their nature may be? The insertion of all those covenants, whether usual or unusual, in the defendant's lease is matter not of choice, but necessity. The defendant may, before he agrees, satisfy himself as to the covenants. But I will not leave to future litigation a term in the contract which I cannot possibly dispense with. Therefore it was that I authorised an absolute contract, and I will not be a party to one that is conditional on such a point." I am satisfied, that, unless the difference between the memorandum as originally drawn, and as altered by the pencil addition, could be treated as unreal, the plea must have been allowed. In considering the point, regard must especially be had to the position both of the plaintiff *and defendant with respect to Sir Richard Sutton's leases. Whatever the willingness of the plaintiff might be to meet the defendant's

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objections, she could not dispense with Sir Richard Sutton's covenants; and if the plaintiff might have objected, so might the defendant. There was no agreement until both had assented to the same terms.

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But it may be argued that the covenants in Sir Richard Sutton's leases are so plainly not unusual, that the distinction between the memorandum as originally drawn and as altered by the pencil additions is merely verbal. Upon the former of these points, the character of the covenants, I give no opinion; and, as an abstract proposition, I will not deny that a case might exist in which the Court would be bound to consider an attempted distinction as plainly nugatory; but the case cannot be of that character, only because the Court may, after argument, come to the conclusion that given covenants are not unusual. The case, to be brought within the scope of that reasoning, should be one in which the Court is in a condition to treat the defence as plainly litigious, and nothing else. I think that observation cannot be applied to this case, and that, on the 8th of January, the case was with the defendant.

The most favourable way of looking at the case for the plaintiff, is to suppose that defendant's acts, after the 8th of January, were successive offers, gradually approaching to the plaintiff's terms, until they reached a point at which the solicitors had implied authority to bind the plaintiff; but that will not be enough; for, if owing to the want of implied authority in Lofts or the solicitors, the memorandum of the 7th of January was on the 8th only a proposal, it was only a proposal on *the 15th; and the letter of the defendant on that day, brought the case within *Holland v. Eyre*.

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I lay out of the case the concession made by the plaintiff after the 17th of January. The question before me is, what was the position of the parties upon that day. And I think it was the same as on the 15th of January.

There are two other points which I shall briefly notice, before I state the conclusion to which I have come. One of these was made by the defendant, founded upon the case of *Fildes v. Hooker* (1). I do not, in the least degree, doubt the power of the Court to enter upon the question of title at the hearing of the cause, or to make such a question a ground for dismissing the bill; but, in order that it may be proper so to deal with a cause, the defect, or supposed defect in the title should be prominently put forward in the pleadings. I cannot say that I think such is the case here. The

(1) 2 Mer. 424. See note, *ante*, p. 149.

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and costs prayed as relief against him, are limited to cases of fraud, in the sense in which fraud is understood in a court of equity, to which the agent is a party, and do not apply to a case in which, though the agent acts erroneously, he acts openly and avowedly (1).

THE bill was filed on the 11th of October, 1847, by Louisa, the wife of the defendant James Marshall, and James and Louisa H. F. Smith, against Thomas Penny and William Marsh, the trustees of a settlement made on the marriage of Mrs. Marshall with her first husband, and against William Sladden, the solicitor of the trustees. The bill complained of the conduct of the trustees, as having unnecessarily occasioned costs, which they were about to raise and pay by means of a sale of the estate comprised in the settlement. The bill alleged, that the intended sale, which was advertised to take place on the 22nd of October, 1847, was a fraud upon the power of sale contained in the settlement, and it prayed that an account might be taken of the receipts and disbursements of the trustees, and the defendant Sladden, their solicitor, disallowing therein the costs complained of; that new trustees might be appointed, instead of the defendants; that they might be restrained by injunction from proceeding with the sale, and might pay the costs of the suit.

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The power of sale in the settlement provided that it should be lawful for the trustees therein named, and the survivor of them, and the heirs of such survivor, *(subject to the mortgages), at any time or times thereafter, but during the life of John Maude Smith (the husband), with his consent to dispose of and convey, either by way of absolute sale or in exchange for or in lieu of other freehold, copyhold, or leasehold hereditaments in England or Wales, all or any part of the hereditaments thereby appointed and released, and the inheritance thereof in fee simple, to any person or persons, for such price or prices in money, or for such equivalent in freehold, copyhold, or leasehold lands, tenements, or hereditaments, as to the said trustees, or the survivor, &c., should seem reasonable and expedient; and to make such sale or sales as aforesaid, either by public or private contract, and in one or more lot or lots, and either at the same time or different times. (Power to buy in, rescind contracts, resell, &c., and upon any such exchange to give or receive any sum of money by way of equality of exchange.) And it was thereby agreed and declared, that, when all or any of the hereditaments thereby appointed and released, should be so sold for a valuable consideration, or any money should be received

(1) *Weise v. Wardle* (1874) L. R. 19 Eq. 171.

for equality of exchange, the trustee, or the survivor, &c., should, with or out of the money to arise from such sale or sales, or so to be received for equality of exchange, in the first place pay all costs, charges, and expenses which should have been incurred upon any such sale or sales, or exchange or exchanges, or otherwise, in the execution of the trusts and powers thereby created; and after payment thereof should, so far as such money would extend, pay off and discharge the principal sums or sum of money, interest, costs, charges, and expenses for the time being secured upon the said hereditaments thereby released; and, after making the aforesaid payments, should, if and when they or he should think proper so to do, lay out *and invest the residue (if any) of the said money, arising from such sale or sales, or so to be received for equality of exchange, or any part of such residue, in the purchase of freehold, copyhold, or leasehold estates; and that the trustees should settle and assure, as well the hereditaments so to be purchased as the hereditaments to be taken in exchange, upon the same trusts and for the same intents and purposes as are thereby declared of and concerning the hereditaments thereby appointed and released. And it was thereby further agreed and declared, that, until the said residue of the said money arising by any such sale or sales, or to be received for equality of exchange, should be laid out and invested as thereinbefore mentioned, or in case the same or any part thereof should not be so laid out or invested, the trustees should lay out and invest the same upon Government or real securities in England, and alter and transpose the said stocks, funds, and securities, for or into other stocks, funds, or securities of the like nature, as often as they should deem expedient, and hold the same upon the trusts thereinbefore expressed of the hereditaments thereby appointed and released.

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Mr. Rolt and Mr. Goodeve, for the plaintiffs.

The *Solicitor-General* and *Mr. Speed*, for the defendant Sladden.

Mr. K. Parker and *Mr. Terrell*, for the defendants Penny and Marsh, the trustees.

The argument was, first, that the intended sale was either illegal, or an improper exercise of the power; in either of which cases the Court would restrain the trustees from parting with the legal

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estate: *Mortlock v. Buller* (1); *and in such a case, the solicitor, who became a party to such a transaction, under circumstances showing that the interests of the cestuis que trust were not consulted, was properly made a defendant. [*Fyler v. Fyler* (2), *Harvey v. Mount* (3), *Beadles v. Burch* (4), *Keane v. Robarts* (5), *Dove v. Everard* (6), *Attwood v. Small* (7), and other cases were cited.]

THE VICE-CHANCELLOR :

The plaintiffs are beneficially interested in an estate called East Studdal Farm, comprised in a settlement dated the 12th of October, 1844, made on the marriage of the plaintiff Louisa Marshall with her first husband, John Maude Smith. The plaintiff Louisa Marshall is tenant for life to her separate use. In execution of powers in the settlement, the estate became subject to a mortgage for securing 5,500*l.*, and interest at 4 per cent., which mortgage was vested in J. Jarvis, before and at the time of the transfer of the same mortgage by Jarvis to Wraith, in August, 1847. The original trustees of the settlement were Thornton and defendant Thomas Penny. Thornton retired from the trust in the summer of 1846, and James Holland was appointed in his stead.

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On the 27th of January, 1847, Jarvis gave notice that the rate of interest must be raised to 5 per cent., or the mortgage paid off. This notice was, (as I understand,) formally given both to the plaintiffs and to the trustees; but this point, however, is not material. Both had notice of Jarvis's determination, and both, by their solicitors, acted upon it. Walker, in the transactions that followed, was and acted as solicitor for the plaintiffs, Sankey for Jarvis, and the defendant William Sladden (who up to this time had been solicitor for the plaintiffs) for the trustees.

Walker, it appears, had a friend named Wraith, who was willing to advance the 5,500*l.*, and such further sum as would cover the costs of the transfer at 4 per cent., and to stipulate for a continuance of the loan for five years. Sladden, however, insisted that the trustees were the proper parties to carry out the transaction; and he also, on behalf of the trustees, and under their authority, proceeded to procure the money necessary to pay off Jarvis's mortgage.

By a letter from Holland the trustee, to Sladden, dated the

(1) 7 R. R. 417 (10 Ves. 292).

(2) 52 R. R. 217 (3 Beav. 550).

(3) 68 R. R. 146 (8 Beav. 439).

(4) 51 R. R. 264 (10 Sim. 332).

(5) 20 R. R. 306 (4 Madd. 332).

(6) 32 R. R. 200 (1 Russ. & My. 231).

(7) 49 R. R. 115 (6 Cl. & Fin. 232).

13th of January, 1847, it would appear that Holland was at that time of opinion that a transfer of Jarvis's mortgage, at 4 per cent., and not a sale, was the proper course to be adopted, provided the mortgagee would consent to the mortgage remaining as long as desired by the mortgagor. I say, a mortgage, in preference to a sale, because, from the bill and otherwise, I think it must be collected that the question between a sale and the transfer of the mortgage had been brought forward almost immediately after Jarvis's notice.

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A triple correspondence took place between the three solicitors, Walker, Sankey, and Sladden. In the result *Walker procured the mortgage to be transferred by Jarvis to Wraith, as a security for 5,639*l.* 2*s.* 6*d.* (a sum made up of 5,500*l.* principal, 46*l.* 4*s.* 6*d.* interest, and 92*l.* 18*s.* costs,) and with a stipulation expressed in the deed, for the continuance of the mortgage during five years. This transfer was made without the deed being submitted to the trustees, and without their being apprised of the intended addition to the principal debt.

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The deed is dated the 9th of August, 1847: it was not, I understand, executed by Wraith. Notice of it appears to have reached Sladden immediately, for in August Sladden by letter asks for a copy of the transfer. After this, on the 4th of September, Holland retires from the trust, and the defendant Marsh was appointed trustee in his stead. This appears to have been done without consulting the plaintiffs, or James Marshall, or any one on their behalf. Marsh is a near relative of Sladden. He is, I understand, a trustee of the settlement made upon the second marriage of plaintiff Louisa Marshall with defendant James Marshall, but Sladden was the solicitor on the occasion of that settlement.

In the meantime Sladden, professing to act under the direction of the trustees, had treated and agreed with one Williamson to advance a sum exceeding 5,500*l.*, at 4½*l.* per cent. for the purpose of paying off Jarvis's mortgage and costs incurred by the trustees, including costs and expenses incurred in relation to the treaty and agreement with Williamson. On the 25th of September Sladden gave notice to Walker, that it was the intention of the trustees to sell the estate. This letter was as follows :

“The trustees of the estate, instead of involving themselves in litigation, and instead of incurring further *expense for the purpose of obtaining a transfer from Mr. Wraith by the proceedings mentioned, will endeavour to do the best they can for the estate,

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under the circumstances which now exist, and will proceed under Mr. Parker's advice to a sale of the estate under the powers given in the settlement. I wish also to inform you, that the trustees have incurred considerable costs and expenses with respect to the advance intended to have been made by Mr. Williamson and his clients, which are chargeable upon, and which will be charged by them against the estate, and that, rather than incur the expense or responsibility of raising (in the present state of things) a further sum by way of mortgage, under the power given them in the settlement, to pay the costs, charges, and expenses they have incurred, they will retain the same out of the purchase-money of the estate. Should the trustees be unsuccessful in effecting a sale, they will then determine upon the propriety of raising a further sum for the purposes mentioned, by way of mortgage."

I have already noticed, that Sladden had insisted from the outset, that the trustees, and not the plaintiffs, were the proper persons to carry out the transfer of Jarvis's mortgage. The letter of the 25th September still insists upon this, and speaks of procuring a conveyance from Wraith. This, it is said, counsel have advised the trustees they had a right to do.

On the 11th of October, 1847, the bill was filed.

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The plaintiffs insist, that no costs incurred by the trustees, in relation to the treaty and agreement with Williamson, ought to be charged upon the trust estate; that the attempt to sell was a breach of trust; that the appointment of Marsh as trustee was improper; that *Sladden had so acted, by receiving rents and otherwise, as to make himself primarily liable to them as an accounting party, and also liable for the costs of the suit, as having concerted with the trustees, for his own purposes, the sale which it is the object of this suit to prevent. The bill accordingly prays the removal of the present trustees, and the appointment of new; and that no costs, incurred by the trustees in relation to the transfer of Jarvis's mortgage, or in relation to the retirement of Holland or appointment of Marsh, may be allowed against the estate. The bill also prays, as against the trustees and against Sladden, accounts of their receipts and payments in respect of the trust; and that they may pay the costs of this suit.

The course which the argument took makes it convenient that I should explain my views under two different heads: first, by considering the case as against the trustees only—that is, supposing Sladden were not a party; and, secondly, whether Sladden is properly made a party.

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In the argument upon the first of these heads, some extreme points were contended for. It was said, that the plaintiffs were the proper parties to raise the money for the discharge of Jarvis's mortgage, and that the interference of the trustees was altogether improper. If Jarvis had simply sought to transfer his security to a stranger, without the privity of the parties interested as mortgagors, the proposition contended for might have passed without notice; for in that case, the position of the parties interested in the estate would not have been altered by the transfer. But when the trustees received from the mortgagee the notice of February, 1847, it became their duty to protect the estate against the possibilities of sale or foreclosure by the mortgagee; and *this they could only do by seeing that the money required for the discharge of the mortgage was forthcoming. This would be their duty, in the simple case of paying off the existing debt. But when, in addition to this, it was intended to increase the debt upon the estate by adding to it the plaintiff's costs of carrying out the transaction, and also by converting the interest then due into principal—a satisfactory explanation of which I have not heard—I can have no hesitation in saying, the transaction was one upon which the trustees ought to have been consulted, and that, as it now stands, it is irregular and improper. Like observations apply as to the stipulation for five years. Wraith ought to have been required to execute the deed. It is no answer to this to say, that any sum improperly charged upon the estate may be struck off; or that Wraith, by accepting benefits under the deed, is bound by such of its provisions as impose duties upon him. Matters such as these are not to be left to future litigation. The estate should be protected by proper deeds, and the office of trustees is to take care that it is so protected; and if the controversy between Sladden and Walker had been directed and confined to the points above noticed, I should have had comparatively little difficulty in dealing with this case. But this is not the simple case with which I have to deal.

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I agree with the plaintiff's counsel, that the principal point to be tried in this case is, whether the sale, which it is an object of this suit to prevent, was or not a justification on the part of the trustees. I must consider the bill as filed for the purpose (in part at least) of preventing the intended sale. And with reference to this, the three points arise: first, are the costs incurred in relation to Jarvis's mortgage properly chargeable upon the trust estate? If so, secondly, were the *trustees justified in raising them by sale?

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And, thirdly, can the sale be justified under the power of sale and charge contained in the settlement of October, 1844?

In noticing these points, I will begin by supposing Wraith's mortgage free from objection. And, first, with respect to the costs incurred in relation to Jarvis's mortgage. For the reasons already mentioned, I think the trustees are *prima facie* entitled to the costs. The question is, whether (being so entitled in the first instance) they were justified in putting the estate to expense in their endeavours to raise money after they had notice that the plaintiffs had the money at command, upon the terms proposed by Wraith. That notice would have justified them in requiring that Wraith should bind himself to advance the money when required. But I am satisfied that I ought not to charge the estate with any costs occasioned by their treaty and agreement with Williamson, after the trustees had notice of Wraith's offer, or such notice as ought to have put persons acting in the trust upon inquiry. So far, therefore, as the sale had for its object the payment of costs incurred after such notice, I think the purpose of the sale was not legitimate.

The view which I take of this case makes it unnecessary that I should consider the second and third points apart from each other. The settlement of October, 1844, empowers the trustees to raise money by mortgage for the purpose of paying costs. But after repeated consideration of the power of sale and exchange contained in the settlement of October, 1844, and comparing the clause with common precedents of powers of sale and exchange, I am satisfied that the parties to the settlement of October, 1844, contemplated the possibility of its becoming expedient to sell the *estate without reference to any contemplated exchange, and that they intended, as in terms they have done, to arm the trustees with a power for that purpose. I may observe, with reference to what Lord ELDON said in the case of *Mortlock v. Buller* (1), that he does not lay it down as an absolute proposition, that, under the ordinary power of sale and exchange, trustees can in no case sell, except with a view to a contemplated exchange. He says only that a very special case must exist to justify such a course. But whether I am right or not in my construction of the clause in question, it is clear that the trustees cannot justify the sale which it is the object of this suit to prevent, unless the sale was determined upon as the course most for the benefit of the plaintiffs, irrespective of the controversy between

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(1) 7 R. R. 417 (10 Ves. 292).

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Walker and Sladden. Now, giving the trustees credit for having intended to speak the truth in their answers in this cause, I cannot, upon the evidence before me, hesitate in coming to the conclusion that the trustees put themselves into the hands of Sladden, to an extent which has deprived the plaintiffs of the benefit of that independent judgment, on the part of the trustees, to which they were entitled; and that the sale, which it is the object of this suit to prevent, was resorted to by Sladden as the means of carrying the controversy between himself and Walker to a successful result on the part of the former. And, inasmuch as part, at least, of the costs for which it was intended to provide by the sale is not, in my opinion, properly chargeable upon the estate, I think the sale, if completed, would have involved to some extent a breach of trust, and that the suit has been occasioned, in part, by conduct for which the trustees are responsible, and of which the plaintiffs have a right to complain. The precise day on which *the trustees had notice of Wraith's offer I need not determine. I am quite clear it must be ascribed to a very early date in the transactions.

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With respect to the retirement of Holland and the appointment of Marsh, I have no hesitation in saying, that the appointment of Marsh, without communication with the plaintiffs, was improper. Admitting that the mere letter of the settlement of October, 1844, would justify the appointment, still, in the circumstances of this case, it was improper. The trustees must have known that the plaintiffs would, and with just reason, have opposed such an appointment. It was made obviously at Sladden's instance, in order to keep the trust more completely under his dominion. This is not the course which trustees ought to pursue; and I must consider the trustees as responsible for the acts of Sladden. I must, in fact, consider his acts as their acts.

Upon the assumption, then, that Wraith's mortgage is free from objection, it would follow that the trustees have been altogether in the wrong (in what has been done by Sladden on their behalf), since they had notice of Wraith's mortgage. But this difficulty arises—Wraith's mortgage is not free from objection; and the plaintiffs have not the benefit of the argument against the trustees, that, in Wraith's offer, of which the trustees had notice, a transaction was contemplated which was in strict accordance with the trust. Indeed, the trustees might, with some appearance of reason, contend that they were altogether justified in disregarding a notice which had terminated in a breach of trust. But this, I think,

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would be a too lenient, as it would be a very technical view of the case. Had the trustees, as I think they ought to have done, communicated with Walker as soon as they had notice of Wraith's offer, it *is impossible to doubt that the objection to Wraith's mortgage (which is very trifling in amount) would have been obviated. Sladden's motive for not doing so cannot be mistaken; and if in this suit I could correct that which is wrong in Wraith's mortgage, I should have no doubt as to the proper order to be made. In that case the plaintiffs would have had to repair in this suit a breach of trust, to which they were parties, as well as that of which they complain; and I should have repaired both breaches, giving no costs of this part of this suit. And I think I ought not to make any difference upon the point of costs, because another suit may be necessary in respect of Wraith's mortgage (in whose absence I cannot clear the trust estate), unless the parties have the good sense to set the matter right without suit.

Upon the whole, I think the proper decree to be made upon this part of the case, is to remove the trustees, and appoint new ones, without prejudice to the rights of any of the parties to complain of Wraith's mortgage; and in this suit to give no costs, so far as the suit is addressed to the purpose of removing the trustees.

With respect to the account. In the absence of Holland, and in accordance with the arrangement made at the hearing, the decree for the account must not be carried back further than the retirement of Holland; which (as I understand) was on the 4th of September, 1847. There is nothing in the mere absence of Holland to prevent my saying—if, upon the merits, it would be right so to say—that the plaintiffs have a right to require that neither Penny nor Marsh shall continue trustees.

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Next, as to Sladden being a party. I incline strongly *to the opinion that the counsel who drew this bill had not in his mind the cases in which it has been holden that solicitors, concerned in the perpetration of fraud, may, upon a bill filed to be relieved against such fraud, be made parties to it, and costs prayed against them as matter of relief. I think the case intended to be made against Sladden was confined to this: that he had made himself directly liable to account to the plaintiffs as a trustee. Upon this point I retain the opinion I expressed at the hearing. Sladden swears that he acted as agent of the trustees in all his receipts and payments of the trust property. This is in accordance with the presumption to which the facts of the case *primâ facie* give rise. The *onus* is upon

the plaintiffs to prove the contrary; and the plaintiffs, for the reasons I stated at the time of the argument, have not done this.

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If, however, I am to consider the bill as seeking to charge Sladden with costs, upon the ground that he was an accomplice with the trustees in the wrong of which the bill complains, my conclusion is against the plaintiff's right to a decree in that respect.

The practice which, in certain cases, entitles a party to make a mere agent a defendant to a suit, and pray costs against him, is certainly a practice of a very anomalous character, and is open to all the objections pointed out by the LORD CHANCELLOR in *Attwood v. Small* (1). If the Court had determined that every one who assisted another in committing a wrong should be answerable for the injury sustained by the party aggrieved, the practice would not be open to some of the observations which apply to it in its existing state. But that is not the state of the case. The agent is not liable for *the injury committed, but is only a surety for the costs incurred in redressing the wrong. And the question is, whether the present case falls under the practice.

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After what has fallen from the LORD CHANCELLOR, I may with confidence assume that the practice will not be extended to any cases to which it has not already been actually applied. And the question is, how those cases are to be defined. Lord Redesdale, in his *Treatise on Pleadings*, appears to refer the origin of the practice to the case of an arbitrator making a corrupt award. Such cases are very peculiar. The arbitrator is himself, in fact, the wrongdoer. In cases of fraud properly so called, the like observation is correctly applied. If the agent actually misleads the party aggrieved by a *suggestio falsi*, or a *suppressio veri*, which he is under an obligation to disclose, he also himself does the specific wrong of which the party complains, as in the case of the arbitrator. And if the practice be confined to such cases, the practice, however anomalous, is limited in its application. Lord Redesdale's observations, upon a fair construction of them, appear to me to confine the practice to cases of fraud. And, as far as my researches have gone, the Court has never made a decree against a mere agent, under this practice, except upon the ground of fraud. I asked counsel, during the argument, whether any case could be found, in which the Court had made such a decree, except upon the ground of fraud. No such case was produced. But some late cases

(1) 49 R. R. 115 (6 Cl. & Fin. 352 *et seq.*).

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were referred to, in which, from the language of the judgment, it would certainly appear that the MASTER OF THE ROLLS may have thought, although he did not so decide, that a solicitor, who, by his advice and agency, helped his client to commit a wrong, was within the practice, although not actually a party to any fraudulent misrepresentation or *concealment, and although no communication may have taken place between him and the party aggrieved.

The observations of the MASTER OF THE ROLLS are entitled to the greatest weight; but I cannot bring myself to think that the present case is within the practice. In one sense, indeed, Sladden may be considered chargeable with fraud, for every wilful act, by which a wrong is committed, may, in a moral point of view, be so considered. But there is nothing of false suggestion, or improper concealment, or undue influence, or other fraud, in its technical sense, or any fraud, except in the general sense above adverted to, with which Sladden is chargeable. The conduct of the trustees, under his advice, or his conduct, (whichever way I am to consider it,) has been openly and avowedly adverse to Walker and his clients. I cannot think that such a case is within the anomalous practice I am considering.

Stopping here, I think the bill should be dismissed as against Sladden,—but, adverting to the cases at the Rolls, to the difficulty I have felt, and to Sladden's conduct in the transactions which are the subject of this suit, I think I am not violating the rule generally acted upon by the LORD CHANCELLOR,—of throwing the costs of a suit on the unsuccessful party,—by dismissing the bill against Sladden, without costs.

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It was said, however, in argument, that, as the plaintiffs had sought relief against Sladden, upon the specific ground of fraud, and failed to obtain such relief, Sladden is entitled to his costs, under a settled rule, which was lately acted upon in *Lady Wilde's* case (1), in the House of Lords. I do not think the present case is *within that rule. It is not the mere use of the word fraud in the pleadings, that will bring a case within its operation. When acts are charged against a party, which in themselves are fraudulent, the Court, upon the question of costs, always considered the bill as imputing fraud, although the word "fraud" may not be used in the bill. LORD COTTENHAM made that remark in *Pickering v. Pickering* (2), in my hearing as counsel; and I have always held, that the mere

(1) *Wilde v. Gibson*, 73 R. R. 191 (2) 48 R. R. 104 (4 My. & Cr. 289).
(1 H. L. C. 605).

use of the word fraud in the pleadings ought not to affect the question of costs, where the case made is not one of fraud in the proper sense of the term, and the word fraud is only used in the vague and general sense I above referred to, which appears to me to be the case in the present bill.

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Dismiss the bill, without costs as against Sladden. Remove the trustees, and refer it to the Master to appoint new trustees. No costs of the suit, so far as it seeks the removal of the trustees and the appointment of new ones. Account of the trust property, such account, by consent, not to be carried back further than the retirement of Holland. Reserve further directions and costs of suit, except those above provided for. The decree to be without prejudice to the right of any of the parties interested to complain of Wraith's mortgage in any other suit or proceeding.

[On the further consideration of that case reported in 4 De G. & Sm. 468, KNIGHT-BRUCE, V.-C., after saying] that the question was, whether there were circumstances which could justify or excuse the conduct of the trustees, proceeded thus : The estate was subject to a mortgage at 4l. per cent. The mortgagee called in his money, giving notice that he required to be paid off, or to receive interest at 5l. per cent. This was a matter of importance to the tenant for life. Accordingly, she or some of her family found an unobjectionable person who was willing to make the required advance at 4l. per cent. The trustees, however, acting of their own motion or under the influence or advice of their solicitor, thought that the transaction ought not to be carried into effect except under their direction. Without the concurrence of any of the cestuis que trustant, they looked out for another mortgagee, a proceeding which was needless, and worse, even if they had succeeded in finding one at the same rate of interest. But the mortgagee whom they selected would accept no less than 4½l. per cent. Moreover, the settlement contained powers of sale and exchange. Now, it was possible, that, without reference to any eligible estate presenting itself in the market, it might be advisable to sell a part of the settled estate ; as, for instance, if there was a necessity of protecting it from the attack of an adverse mortgagee. But, in this case, there was no necessity or reason for such a proceeding, other than the arbitrary will of the trustees, or of some person employed by them. The tenant for life applied to the Court for an injunction, and the

1851.
June 2.

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BRUCE, V.-C.
[4 De G. &
Sm. 469]

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Court accepted the undertaking of the trustees, that the sale should not proceed. If they had not given that undertaking, they would have been restrained by injunction. It is impossible to view their proceedings (whether they ought to be considered as the instruments of some other person or not) otherwise than as unjustifiable and oppressive. I am of opinion that the suit has been entirely occasioned by their improper conduct, and that they must pay all the costs of it, so far *as the costs have not been disposed of by Sir JAMES WIGRAM. With deference to him, I cannot help saying, that I should have made them pay all the costs without the slightest qualification, and have regretted that I could do no more; but I have no inclination to depart now from what has been done by that eminent and considerate Judge. My only doubt is, whether I should direct proceedings to be taken in the matter of the solicitor under whose advice the trustees acted. I am not, however, disposed to do so unless on the application of some of the parties interested. But, so far as I can properly express disapprobation of his conduct in his absence, I do express my disapprobation of it. The unprofessional portion of her Majesty's subjects are not the property of the professors of the law.



ATTORNEY-GENERAL v. MURDOCH.

1849.
June 29, 30.
July 2, 3, 4, 5,
6, 7, 9, 10.
Nov. 7.

WIGRAM,
V.-C.
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(7 Hare, 445—470; S. C. 19 L. J. Ch. 3; 14 Jur. 588; affd. 1 De G. M. & G. 86.)

Distinction between a trust created for the use of Protestant Dissenters generally, and for the use of an existing congregation of Protestant Dissenters belonging to a particular minister: in the former case Presbyterians, Baptists, and Independents, are included; in the latter, the terms of the trust open an inquiry into the particular character of the congregation which is the object of the trust.

It is not necessary, in order that the Court may be enabled to enforce a trust for a certain congregation of Dissenters, that the trust should be declared by any deed or writing; the Court may ascertain, from evidence of usage or otherwise, the particular trusts to which the property is dedicated.

Where trusts of a meeting-house in England are created for the use of a congregation, to be in as strict connexion as is practicable with the Established Church of Scotland, no person is entitled to be a minister of the meeting-house whose opinions or acts constitute a disqualification for the ministry of that Church; and the fact that the meeting-house is locally situated beyond the jurisdiction of that Church is immaterial.

In determining the question, whether a particular minister was disqualified as a minister of the Established Church of Scotland, the Court considered whether the acts of such minister had brought him within the predicament which, according to the terms of a declaration of the General

Assembly of that Church, constituted a dissolution of his connexion with it, without determining whether the sentence of a particular presbytery, depriving him of his licence, was or was not conclusive as a disqualification.

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An information, filed in March, 1846, at the relation of four persons, who were four of the trustees appointed by a deed of October, 1835, of a meeting-house and premises at Berwick-upon-Tweed, called the Low Meeting-house, and a bill by the same four persons as plaintiffs, against Alexander Murdoch, the officiating minister of the meeting-house, and the trustees who were not plaintiffs. The information and bill sought a declaration that the Low Meeting-house and premises were subject to trusts for the appropriation of the same as a place of public religious worship on the model of the Church of Scotland, and in as strict connexion with the same as was practicable; and that no person was qualified for, or competent to exercise the office of minister or pastor of the Low Meeting-house, without being a licentiate and a recognised minister of the Church of Scotland, and in full connexion therewith, and such further declaration of the trusts of the property as the Court should think proper; that the defendant Murdoch might be restrained from occupying and using the pulpit, and from preaching and teaching in, and in any manner officiating as the minister or pastor of the Low Meeting-house; and that, if necessary, he might be removed; that *the defendants Wilson, Smith, and Thompson, trustees who had concurred with Murdoch, might be restrained from allowing the use of the pulpit to any person, and from permitting any person to preach or teach in the Low Meeting-house, not being such licentiate and recognised minister, and from allowing the premises to be used in any manner otherwise than as a place of public religious worship on the model and in the strict connexion aforesaid; that all necessary and proper directions might be given for the election of a fit minister; and that the defendants Wilson, Smith, and Thompson, might be declared guilty of a breach of trust, and removed; and that new trustees might be appointed.

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Upon the institution of the suit, an injunction was applied for to restrain the defendants from using or permitting the pulpit to be used in the manner complained of. The Court on that occasion considered that the case differed from that of *The Attorney-General v. Welsh* (1), in the fact that the original trust was not so

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conclusively proved, as would justify the Court in giving the relief sought upon an interlocutory application; and the Court refused by injunction to do more than restrain the defendant Murdoch from teaching or preaching in the Low Meeting-house otherwise than in conformity with the doctrine, discipline, and practice of the Church of Scotland.

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The information and bill were taken *pro confesso* against the defendant Thompson, and the answers of the other defendants, except Murdoch, Wilson, and Smith, were not replied to. The evidence entered into in support of the information and bill, and on the part of the defendants Murdoch, Wilson, and Smith, was voluminous, *and included, besides the instruments relating to the particular property, many matters of public and individual history, relating to the dissenting bodies in Berwick and elsewhere, and to the persons who had from time to time officiated as ministers at the Low Meeting-house.

The first minister of the congregation, which became at a later period the possessors of the Low Meeting-house, of whom any evidence appeared, was named Ogle. Ogle was minister of the congregation in 1685. He was succeeded by Foster, and Foster was succeeded by John Turner; other ministers had succeeded from time to time, and the defendant Alexander Murdoch was appointed in 1836.

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The first instrument under which the meeting-house appeared to have been acquired by the predecessors of the present congregation, was an indenture of feoffment, dated the 27th of September, 1717, whereby John Simpson enfeoffed John Douglas and his heirs with a burgage or tenement, barn and garden, therein described. John Douglas, in consideration of 105*l.*, conveyed the premises by lease and release, dated the 21st and 22nd of May, 1719, to Stow and five others, and their heirs. Stow and the three other surviving releasees, by lease and release of the 29th and 30th of July, 1734, in consideration of 100*l.* conveyed the premises then described as “all that burgage or tenement and garden thereunto belonging, (on part whereof there has been lately erected a house, now used as a meeting-house for a congregation of Protestant Dissenters,)” to Sibbitt and Temple, and their heirs. Sibbitt and Temple, by lease and release of the 1st and 2nd of August, 1734, for the same consideration conveyed the premises, by the same description, to Stow and seven others, their heirs and *assigns. By lease and release, dated the 9th and 10th of January, 1766, made between Stow, apparently the surviving releasee named in the preceding deed, of the one

part, Hodgson and several others, described as members and contributors to the support of the pastor of and belonging to the meeting-house,—and John Gardner, of the other part, reciting the deeds of August, 1834, and that the premises by right of survivorship were then legally vested in Stow, it was witnessed, that Stow did thereby declare that the premises were so conveyed upon trust only, and to and for the people or congregation of Protestant Dissenters, then known by the name of the congregation or people belonging to the Reverend Master John Turner, and to and for no other use, intent, or purpose whatsoever; and Stow thereby conveyed the same to Hodgson and the other parties of the second part, upon corresponding trusts (1). The subsequent deeds down to those of October, 1835, under which the plaintiffs and defendants became trustees, referred to the deed of January, 1766, as expressing the trusts of the property.

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Proceedings were instituted against Mr. Murdoch before the Presbytery of Dumfries, and in August, 1845, sentence was pronounced by that Presbytery, declaring that Mr. Murdoch had by his own act ceased to be a licentiate of the Church of Scotland as by law established, and that he was thenceforth disqualified, not only from receiving any presentation or appointment to a parochial or other spiritual charge in the said Church of Scotland, but also from retaining the status of a minister of the said Church in any place whatsoever, unless reponed by the competent ecclesiastical judicatory. Mr. Murdoch had protested against the jurisdiction of the Presbytery of Dumfries; and he adduced evidence in the cause for the purpose of *showing that it was not binding upon him, or that he was not thereby disqualified for the ministerial office in the Church of Scotland.

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The conclusion of the Court, on the result of the evidence of the trusts, as they were to be collected from the general usage of the parties who had been in the enjoyment of the trust property, and on the consequences of the acts by which it was alleged that the connexion of Mr. Murdoch with the Church of Scotland had been severed, appear in the judgment, to which some notes have been added where they seemed necessary to explain the facts referred to.

The *Solicitor-General*, Mr. Little, and Mr. T. D. Salmon, for the information and bill; and

Mr. Lewin, for the defendants, who concurred in the view of

(1) These are stated in the judgment, *infra*, p. 185.

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the trust taken by the plaintiffs, relied upon the principles laid down in *The Attorney-General v. Munro* (1), and *The Attorney-General v. Welsh* (2). They also cited *Attorney-General v. Drummond* (3), *Milligan v. Mitchell* (4), *Broom v. Summers* (5), *Attorney-General v. Pearson* (6), and *Craigdallie v. Aikman* (7). And on the argument that the trusts must be ascertained, in the absence of distinct expression, by usage, *Archbishop of York v. Stapleton* (8), *Attorney-General v. Parker* (9), and *Chad v. Tilsed* (10).

Mr. Rolt, Mr. Malins, and Mr. Selwyn, for the defendants Murdoch, Wilson, and Smith.

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On the part of the defendants it was contended, that the alleged connexion of the congregation of the Low Meeting-house, with the Established Church of Scotland, was not supported by the evidence. It was not found in the deeds of trust. There was nothing in those deeds to limit the use of the property to any particular class of Protestant Dissenters. The declaration by Stow, in the deeds of 1766, could not properly be imported into the trust; but, even if introduced, there was nothing in that declaration beyond the fact, that John Turner was the minister, which was perfectly consistent with the generality of the trust. There was no distinct proof that the successive ministers had been licentiates of the Established Church of Scotland, or even that John Turner had been a minister of that Church. All the historical facts were opposed to the pretended connexion: it could not have existed in 1685, when the congregation was first formed, for the Church of Scotland was then Episcopal. The limitation to a class of Dissenters, separated by any definite boundary from other Dissenters, necessarily involved the existence of creeds or articles of subscription; but the existence of any such restrictions among the Protestant bodies dissenting from the Church in this country was contradicted by the history of the times in which this foundation took its rise, and by the known repugnance of the Dissenters of that age to such restrictive formulæ. All the inferences to be drawn from the later efforts of this congregation, and others holding similar opinions, to unite themselves closely with the Established Church of Scotland, was against the

(1) 79 R. R. 151 (2 De G. & Sm. 122).

(2) 67 R. R. 152 (4 Hare, 572).

(3) 59 R. R. 292 (1 Dr. & War. 353).

(4) 36 R. R. 315 (1 My. & K. 446;
S. C. 3 My. & Cr. 72).

(5) 54 R. R. 396 (11 Sim. 353).

(6) 17 R. R. 100 (3 Mer. 409).

(7) 21 R. R. 107 (2 Bligh, 529;
S. C. 1 Dowl. 1).

(8) 2 Atk. 136.

(9) 3 Atk. 576.

(10) 23 R. R. 477 (2 B. & B. 403).

probability of the previous existence of any such union,—an union which was, moreover, in the nature of things, impossible, inasmuch as the Established Church of Scotland could not impart any of their rights or privileges as an establishment to persons adopting their religious opinions beyond the *border, nor could such persons in England be members of, or be represented for any practical purpose in the General Assembly of the Church of Scotland. It was impossible the union could be anything more than sympathy derived from a conformity in religious views. It was substantially, though not formally, analogous, for example, to the sympathy which was felt by some of the clergy and laity in the Church of England for the congregations separated from the Church of Rome, to be found in the remoter parts of Piedmont and Savoy, and through whom many of such persons appeared to be anxious to trace the preservation of a primitive faith anterior to the Reformation. This kind of sympathy might be, as in fact it was, more or less fervent at different times, and it might cease altogether; but the position of the parties on either side was wholly unaffected by the changes that took place in the light in which they regarded each other.

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They cited *Attorney-General v. Gardner* (1), *Leslie v. Birnie* (2), and *Lady Hewley's case* (*Attorney-General v. Shore*) (3).

THE VICE-CHANCELLOR :

Nov. 7.

The dispute in the present case has arisen out of circumstances analogous to those which gave rise to the case of *The Attorney-General v. Welsh* (4), and *The Attorney-General v. Munro* (5). The defendant Murdoch was elected minister or pastor of the Low Meeting-house at Berwick, in the year 1886, and was, as I understand, the thirteenth minister who had held that office since the congregation was first formed, and of *which the congregation now using and claiming to be the owners of the Low Meeting-house at Berwick are the successors. Mr. Murdoch was, at the time of his election as minister, a licentiate and ordained minister of the Established Church of Scotland. The *Attorney-General* and plaintiffs allege that Mr. Murdoch has since adhered to that body, which, after the decision in the *Auchterarder* case (6), seceded from

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(1) 79 R. R. 137 (2 De G. & Sm. 102).

(4) 67 R. R. 152 (4 Hare, 572).

(2) 26 R. R. 14 (2 Russ. 114).

(5) 79 R. R. 151 (2 De G. & Sm. 122).

(3) 54 R. R. 445 (11 Sim. 592; S. C. 9 Cl. & Fin. 355).

(6) See Robertson's Report, 2 vols.; see also 6 Cl. & Fin. 646.

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the Established Church of Scotland, and constitutes what is now called the Free Church; and the case of the *Attorney-General* and the plaintiffs is, that Mr. Murdoch having thus adhered to the body known as the Free Church, has become disqualified for and is incompetent to exercise the office of minister or pastor of the Low Meeting-house.

If, at the close of the argument, I had been as fully aware, as I now suppose myself to be, of what was actually decided in the case of *The Attorney-General v. Munro*, there would have been only one point in the present case, at the utmost, upon which I should have thought it necessary to reserve my judgment; and as that point is the only one upon which, after the best consideration which I have been able to give to the present suit, I think any difficulty can be entertained, I shall endeavour, in the observations I am about to make, to point out how much of this case I consider as virtually decided by *The Attorney-General v. Munro*. In order to do this with greater distinctness, I shall begin with supposing that the trusts which the *Attorney-General* and the plaintiffs contend are the trusts of the Low Meeting-house, are declared by deed, as they were in the cases of *The Attorney-General v. Welsh*, and *Attorney-General v. Munro*; and in considering the case *upon that hypothesis, I will assume that Mr. Murdoch has seceded from the Established Church of Scotland and adhered to the Free Church, and that the Act of the General Assembly, of the 2nd of June, 1845 (1), applies to Mr. Murdoch. Upon these hypotheses the case of *The Attorney-General v. Munro* is a distinct authority, entitling the plaintiffs to the relief they ask.

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The Attorney-General v. Welsh was, I believe, the first of the cases of this class which came before the Court. The second was the present case, upon the notice for an interim injunction, in July, 1846; but at that time *The Attorney-General v. Munro* had not come before the Court; and in giving my judgment in the case of *The Attorney-General v. Welsh*, and afterwards on the motion in the present case, I abstained from giving any opinion on one point, which is now concluded by *The Attorney-General v. Munro*. I did not hesitate to state my opinion, that the decision in the first *Auchterarder* case was in its nature declaratory; that it introduced no alteration in the Established Church of Scotland, and decided

(1) This Act is stated fully in the judgment of the Vice-Chancellor *v. Munro*, 79 R. R. at pp. 182, 183 (2 De G. & Sm. at p. 191).
KNIGHT BRUCE in *Attorney-General*

only what was the then position of that Church. I was pressed with an argument of the defendants, that whatever the case might be as to Scotch churches locally situated in Scotland, and subject to the jurisdiction of the Established Church of Scotland, the question of non-intrusion involved no question of doctrine, discipline, or practice, and that it was purely speculative as regards any proprietary church locally situated in England. Upon the value of this argument I gave no opinion, deciding only, that, upon the evidence then before me, it was impossible I could act upon it; but the decision of *The Attorney-General v. Munro* has set that question at rest. The point arose *in that case, and was, I think, rightly decided. If therefore, the trusts of the Low Meeting-house at Berwick are such as the *Attorney-General* and the plaintiffs say they are; and if those trusts were declared by deed; and if Mr. Murdoch has seceded from the Established Church of Scotland, and adhered to the Free Church; and if the Act of the General Assembly, which I have referred to, applies to Mr. Murdoch, there can be no doubt as to the conclusion to which I must come. The case is bound by authority. The circumstance that the Low Meeting-house at Berwick is locally situated in England, and is not subject to the jurisdiction of the Established Church of Scotland, makes no difference.

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The next point which suggests itself is, whether the absence of a deed, declaring the trusts of the property comprised in the indentures of 1719, makes any difference. It was not argued, nor could it have been argued with success, that there was any rule of law which, in a case circumstanced as this is, makes a deed or even a writing necessary to the case of the *Attorney-General* and the plaintiffs. The consequence of the absence of such deed or writing is, that the *Attorney-General* and the plaintiffs have had cast upon them the burthen of proving otherwise that the trusts of the Low Meeting-house were such as they say they were, in order to entitle them to the decree they ask. This is the question which I stated at the outset has been the real question of difficulty in the present case; and to the consideration of this question I have accordingly directed my best attention. But it will be most convenient that I should reserve this point for the last, and assume, for argument's sake only, whilst I am observing upon other points of the case, that it is to be answered in favour of the *Attorney-General* and the plaintiffs—at least, to this extent, that no person is eligible to, or entitled to hold *the office of minister of the Low Meeting-house,

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whose opinions and acts constitute a disqualification for the ministry of the Established Church of Scotland.

I have hitherto assumed that Mr. Murdoch has, by some positive act or acts, both seceded from the Established Church of Scotland and adhered to the Free Church. From the charge of formal secession, Mr. Murdoch must, I believe, be at once acquitted, except so far as adherence to the Free Church involves in it a secession from the Established Church. I do not find that Mr. Murdoch has, by signing any deed of demission, or other formal act, in terms seceded from the Established Church of Scotland. But is any such express act of secession necessary? The answer to this question must be in the negative. The Act of the General Assembly, of the 2nd of June, 1845, in terms decides that adherence to the Resolution of the Synod, held at Berwick, on the 16th of April, 1844 (1), was alone sufficient *to dissolve the connexion between the adhering members of the Synod of Berwick and the Established *Church of Scotland. The Act of the Assembly treats the adherence itself as a repudiation of that connexion. The words are—"That, as the several members of the said Synod and Presbyteries have, by adhering to the said Resolutions, ceased to be ministers or licentiates of the Church of Scotland as by law established, and repudiated their connexion with the said Church, they are no longer entitled to officiate in any church or chapel in connexion with the Established Church, and are therefore not to be held as ministers or licentiates of the Church of Scotland." Upon reference to the Resolutions of the Synod held at Berwick, mentioned in the Act of the Assembly, of the 2nd of June, 1845, it will not appear that there is anything in them which imports secession from the Church of Scotland on the part of the individual members at the Synod, except what is involved in adherence to the Free Church, and (I do not know whether the observation is worth making), that, before [the Act of the 2nd of June, 1845, the connexion, which in 1836 was formed between the Established *Church of Scotland and the Presbytery of Berwick, was dissolved.

The next question then is, whether Mr. Murdoch has so acted as to have brought himself within the scope of the Act of the General Assembly, of the 2nd of June, 1845? If this question be identical with the question, whether Mr. Murdoch's avowed opinions are those of the Free Church, or of the Established Church of Scotland, there is not, as it appears to me, any room for doubt; but as the

(1) See 79 R. R. p. 183.

evidence appears to me to prove this and a great deal more, I will not embarrass the case by making Mr. Murdoch's private opinions a matter of separate consideration. If it be necessary to decide the point, I think Mr. Murdoch must be considered as an adherent to the Resolutions of the 16th of April, 1844 (1), which, by the Act of the General Assembly, of the 2nd of June, is declared to have *ipso facto* dissolved his connexion with the Established Church of Scotland. The fact that he holds the opinions of the Free Church is a step only in the proof of the adherency; and those opinions, and the charge of adherency, appear to me incontestably proved by Mr. Murdoch's letter of the 8th of September, 1848 (2), *in answer to the plaintiff's letter of the preceding day, by the admissions in his answer, which was read by the plaintiffs as evidence in support of their case (3), by the part which he took in the proceedings of the 16th of April, 1844 (4), by his connexion with the Synod and Presbytery of Berwick, and by the part taken by him in the controversy relating to the Free Church and the Established Church of Scotland. A man adheres to an opinion when he remains firmly fixed in that opinion,—he adheres to a Resolution when, being present at the meeting at which the Resolution is come to, he

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(1) See 79 R. R. at p. 183.

(2) Mr. Murdoch, in this letter, in answer to the question, whether he had given his adherence to the Free Church, said, *inter alia*, "As to having joined the Free Church, it may rather be said to have joined ours, that is to say, holds the standards of the Church of Scotland, without any civil benefice. I have made no change in joining any party, but hold now, as I ever did, the principles of the Scottish Church. That Church itself maintains that our Synod can have no other than a symbolical connexion with it, that is to say, by its standards. Both parties in Scotland have all along maintained that Presbyterians like ourselves, in England, are in these circumstances, and are a co-ordinate and independent Church. To this co-ordinate Church I belong, and, as yet, it has not joined, nor probably will join itself to either of these parties. In no other relation did or can the Established Church of Scotland ever recognise any Presbyterian Church of Scotland. It is only, however, manly and candid for me to

state, that, like every other man, I claim to myself the right to express as well as to entertain a decided opinion in this matter, which is all that I have done, having neither signed nor (from the circumstances I have stated) been required to sign, either the act of separation from the Establishment in Scotland, or the deed of demission, which the seceding ministers all did."

(3) Mr. Murdoch, by his answer, said, "That, as to the points of difference, he thought the Free Church was in the right, and had entertained and expressed that opinion,—that he might have stated that he should decline to accept a presentation to a church in Scotland, if it were offered to him; but he declined to answer whether, if such presentation were now offered to him, he would accept the same; or, if not, why he would not accept the same."

(4) Mr. Murdoch was present at the meeting, and seconded the resolution to adopt the overture of that day.

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assents to it, and gives it the authority of his voice and sanction. No particular form of doing this can be requisite. The Judge who has to decide the case must, as a jurymen, decide upon the evidence before him, whether the party charged with adherency is or not proved to have adhered in the sense above explained. In *The Attorney-General v. Munro* the Vice-Chancellor KNIGHT BRUCE so reasoned on this part of the case. He reviewed the several acts of Mr. Munro, for the purpose of seeing whether the charge of adherency made against that gentleman was or not substantiated, and concluded by saying *that the evidence taken together had convinced him that Mr. Munro, by his opinion and acts, had placed himself in the predicament of adherency stated in the Act of the General Assembly, of the 2nd of June, 1845. The acts of Mr. Munro in that case, upon which the opinion of the Court was founded, were more numerous than are those upon which I found my opinion in the present case; but I think there is enough in this case to justify the like conclusion. In the absence of denial or explanation on the part of Mr. Murdoch, I cannot but regard him as an adherent to the Berwick Resolutions of the 16th of April, 1844, to which the Act of the General Assembly refers. I find no such denial or explanation, as can take away the effect of the acts referred to, bearing on Mr. Murdoch's position with respect to the Established Church of Scotland; and as no change in Mr. Murdoch's opinion is suggested, I must consider his opinions as being the same now as they were in April, 1844.

I think it right, however, to add, that, in a case like the present, in which I am called upon to administer the trusts of a charity, I am not prepared to admit that it is necessary for the plaintiffs to prove the adherency of Mr. Murdoch to the Resolutions of the 16th of April, assuming (as I now do) that no person is eligible to, or entitled to retain the office of minister of the Low Meeting-house, whose opinions and acts constitute a disqualification for the office of minister of the Established Church of Scotland. It appears to me, that the *Attorney-General* and the plaintiffs have proved enough, if they have proved that Mr. Murdoch is under such a disqualification. The Act of the Assembly, of the 2nd of June, 1845, was addressed to particular subjects; namely, the acts of particular ministers of the Church of Scotland, in adhering to the Resolutions of the 16th of *April; but the offence was not one of form: it consisted in the public declaration of particular opinions, which opinions, so declared, operated in the way pointed out by the

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Act of Assembly. If I find these opinions entertained, and openly declared, and acted upon by Mr. Murdoch, can I (upon the assumption which I now make) avoid holding that he is disqualified for the office of minister or licentiate of the Established Church of Scotland, and consequently, no longer qualified to hold the office of minister of the Low Meeting-house at Berwick, only because the *Attorney-General* and the plaintiffs may not have succeeded in proving his adherency to the Resolutions of the 16th of April, 1844? The argument must be, that an Act of Assembly, or some ecclesiastical judicatory, is necessary; and that this Court cannot incidentally determine that Mr. Murdoch's opinions and acts disqualify him for the office of minister of the Established Church of Scotland, however plainly and publicly those opinions may be declared. I cannot think that such a conclusion would be right. In this case, I consider the evidence as proving, beyond dispute, that Mr. Murdoch is a member of the Free Church. I cannot consider that point as being really at issue in this cause; and, if that be so, the consequence must be in this suit the same as if adherency to the Resolutions of the 16th of April, 1844, had been (as in fact I think it really is) proved. I adhere to the opinion I expressed in *Welsh's* case. In the above conclusion, my judgment may possibly have erred; but since I have read the judgment in *The Attorney-General v. Munro*, I have considered that case as settling every point which is necessary for the decision of the present case. Upon the questions of fact, so far as I have hitherto considered them, I think the evidence satisfactory.

I come now to that question in this case which relates *to the trusts of the Low Meeting-house at Berwick, and upon this part of the case I will not deny the existence of considerable difficulty. Strange as it may seem, the history of dissent appears to show that the objection entertained by Dissenters to tests and subscriptions was so strongly felt by all, that it would almost appear to have been a sufficient bond of union between different denominations and classes of Dissenters as against the Established Church, however much the Dissenters may have differed among themselves. *Lady Hewley's* case (1) is in point. The bequest in her will was held to be a bequest to Protestant Dissenters; and it was decided, without reference to Lady Hewley's religious opinions, that three distinct classes of Dissenters, namely Presbyterians, Baptists, and Independents, were objects of her bounty. I need not pursue this point

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(1) 54 R. R. 445 (9 Cl. & Fin. 355; 11 Sim. 592).

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further; but, however this may be in the case of a general bequest to Protestant Dissenters, I cannot very readily come to the conclusion that a particular congregation, building a meeting-house for their own use, can have intended the same thing, and considered it a matter of indifference whether the minister they elected was a Presbyterian, Baptist, or Independent. Any of the classes of Dissenters may think it right to permit a minister of a different denomination of Dissenters occasionally to fill the pulpit; but it is quite another thing to suppose that an existing congregation would not require some more positive standard of truth than the mere exclusion of tests and subscription.

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In this case, however, it was said that the terms of the foundation deed decided the question, and showed that the trusts of the Low Meeting-house, were trusts for Protestant Dissenters generally. To that argument *I was at the hearing of the cause, and I still am opposed. The deeds which are said to evidence the trusts are four in number. The first were dated the 21st and 22nd of May, 1719, by which the parcel of land upon which the Low Meeting-house at Berwick was afterwards erected and now stands, was conveyed to trustees for the use of an existing congregation of Protestant Dissenters. The existence of this congregation appears to be carried back as far as the year 1686, and in 1719 John Turner was minister of the congregation. There is nothing in the language of this deed which appears to throw any light upon the subject of the present inquiry. In July, 1734, it became necessary to appoint new trustees of the Low Meeting-house; and by indentures of the 29th and 30th of July, 1734, the surviving trustees of the deed of 1719 conveyed the property to other trustees, who, by indentures of the 1st and 2nd of August, 1734, reconveyed to the old and some new trustees upon trust for the congregation to whom the Low Meeting-house then belonged. In the deed of July, 1734, the Low Meeting-house is described as a house then used as "a meeting-house for a congregation of Protestant Dissenters." The same description is applied to the Low Meeting-house in the deed of August, 1734. By indentures of lease and release of the 9th and 10th of January, 1766, the Low Meeting-house at Berwick was again conveyed to new trustees. In that deed, which recites the prior deeds of August, 1734, one Stow, who was a party to the deeds of 1734, declared that the Low Meeting-house had been conveyed by the indentures of August, 1734, "upon trust only, and to and for the people and congregation of Protestant Dissenters then known by the name of

the congregation or people belonging to the Reverend Master John Turner, and to and for no other use, intent, or purpose whatsoever ;” and by the indentures of 1766, the Low Meeting-house was conveyed *to new trustees, in trust for the people or congregation then lately belonging to the said John Turner, and whereof John Gardner (a party to the deeds of 1766) was then pastor or minister, and in the trust and confidence that the trustees to whom the Low Meeting-house was thereby conveyed should permit the same to be used, occupied, and enjoyed, as and for a meeting-house or place for the assembly of a particular Church or congregation for the worship or service of God, by the society or congregation of Protestant Dissenters known by the name of the congregation late belonging to the said John Turner, and whereof the said John Gardner was then the pastor or minister, and for the use or convenience of all such others as should thereafter come into and join the said society, and attend the worship of God in the said place, and should contribute and pay towards the support of the minister for the time being of the said congregation, and towards keeping the said meeting-house in repair. In this deed was contained a power of appointing new trustees, and the persons so to be appointed trustees are to be such sober and religious persons, being Protestant Dissenters of good credit and reputation, and also members of the said meeting-house, and contributors towards the support of the pastor thereof for the time being, as were most likely to defend, perform, and promote the trusts thereinbefore expressed.

New trustees have been since appointed from time to time, but in none of the deeds subsequent to 1766 is anything found to alter the argument as it stands upon the deeds I have already noticed. The argument for Mr. Murdoch and those who take part with him was, that the deeds above cited show that the trusts of the Low Meeting-house were trusts for Protestant Dissenters generally; that I must refer the deeds of 1784 and 1766 *back to the year 1719, when the land upon which the Low Meeting-house was built was conveyed to trustees for the use of an existing congregation of Protestant Dissenters, and treat the whole as a foundation deed declaring a trust for a congregation of Protestant Dissenters generally, and not Protestant Dissenters of any particular denomination. If this argument were well founded, (and for the purposes of the argument I will suppose all the deeds to be dated in 1719,) and these trusts are to be taken as the trusts upon which the property was originally acquired, and to which it was dedicated in 1719, it would follow that

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Presbyterians, Baptists, and Independents, are alike included in the trusts of the deeds. I have heard nothing to satisfy me that those trusts have been varied by anything that has since taken place, but I am satisfied the argument is not sound. There is a fallacy in confounding words of gift with words of recital. A gift to Protestant Dissenters would, according to the decision in *Lady Hewley's* case, include Presbyterians, Baptists, and Independents; but a gift to an existing congregation of Protestant Dissenters raises a very different question as to the parties for whose benefit it is intended. The simple gift raises the question, what is meant by the words Protestant Dissenters. The recital raises the question, of what class of persons did the congregation of Master John Turner consist. To those persons the deeds, by the recitals they contain, show the property in question to belong; and it would be a violation of every rule of construction and common sense to say, that the words of the deeds in question were equivalent to a declaration of trust in favour of Protestant Dissenters of every denomination, if in fact, as the information and bill allege, the congregation of John Turner was a congregation of Presbyterian Dissenters, in as strict connexion as was practicable with the Established *Church of Scotland. Upon this point of the case I cannot bring myself to think there is reasonable ground for doubt. The question is as to the character of the congregation of John Turner. With respect to the clause in the deed of 1766, for the appointment of new trustees, it does not, upon consideration, alter the view I have already taken, although, at the time of the argument, it appeared to me to weaken in some degree the observations arising upon the other part of the deeds. But this I now think it does not; for the qualification required in the persons to be appointed new trustees refers back to the anterior parts of the deed and the trust thereby declared, which raises the same question as before—what was the character of the congregation of Master John Turner? The requisition is, that the trustees shall be not only Protestant Dissenters, but members of the congregation.

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Another point, much dwelt upon in argument, was the sense to be attached to the expression found in the information and bill, that the Low Meeting-house was in connexion with the Established Church of Scotland. In criticising that expression, I think the *Attorney-General* and plaintiffs are entitled to have the expression read as if they had invariably used the expression in as strict a connexion with the Established Church of Scotland as was practicable; and the meaning of the information and bill in this respect (whether

the congregation or people belonging to the Reverend Master John Turner, and to and for no other use, intent, or purpose whatsoever ;” and by the indentures of 1766, the Low Meeting-house was conveyed *to new trustees, in trust for the people or congregation then lately belonging to the said John Turner, and whereof John Gardner (a party to the deeds of 1766) was then pastor or minister, and in the trust and confidence that the trustees to whom the Low Meeting-house was thereby conveyed should permit the same to be used, occupied, and enjoyed, as and for a meeting-house or place for the assembly of a particular Church or congregation for the worship or service of God, by the society or congregation of Protestant Dissenters known by the name of the congregation late belonging to the said John Turner, and whereof the said John Gardner was then the pastor or minister, and for the use or convenience of all such others as should thereafter come into and join the said society, and attend the worship of God in the said place, and should contribute and pay towards the support of the minister for the time being of the said congregation, and towards keeping the said meeting-house in repair. In this deed was contained a power of appointing new trustees, and the persons so to be appointed trustees are to be such sober and religious persons, being Protestant Dissenters of good credit and reputation, and also members of the said meeting-house, and contributors towards the support of the pastor thereof for the time being, as were most likely to defend, perform, and promote the trusts thereinbefore expressed.

New trustees have been since appointed from time to time, but in none of the deeds subsequent to 1766 is anything found to alter the argument as it stands upon the deeds I have already noticed. The argument for Mr. Murdoch and those who take part with him was, that the deeds above cited show that the trusts of the Low Meeting-house were trusts for Protestant Dissenters generally; that I must refer the deeds of 1784 and 1766 *back to the year 1719, when the land upon which the Low Meeting-house was built was conveyed to trustees for the use of an existing congregation of Protestant Dissenters, and treat the whole as a foundation deed declaring a trust for a congregation of Protestant Dissenters generally, and not Protestant Dissenters of any particular denomination. If this argument were well founded, (and for the purposes of the argument I will suppose all the deeds to be dated in 1719,) and these trusts are to be taken as the trusts upon which the property was originally acquired, and to which it was dedicated in 1719, it would follow that

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present cause. A second point, which I cannot but think important, is the practice of the congregation of the Low Meeting-house at Berwick, proved to be almost uniform, of sending for a minister to some Scotch Presbytery, when, from the illness of their own ministers, or other accidental circumstances, occasion required they should supply the absence of their own ministers. The third and last point I shall notice, is the direction of the English Presbyteries by the General Assembly of the Established Church of Scotland, at the instance of the former. Combining this with the admitted connexion between the Low Meeting-house, and the Presbytery of Berwick, I cannot but conclude that I have, in 1837, the unqualified admission of the congregation of the Low Meeting-house at Berwick, and of Mr. Murdoch their minister, that at that time the Low Meeting-house sought to establish and did establish, as close a connexion with the Established Church of Scotland as was practicable; and that such connexion was maintained by the congregation of the Low Meeting-house at Berwick, until the disputes arose which led to the formation of the Free Church.

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Opposed to this were certain Resolutions, which, on the 9th of July, 1809, and again on the 7th of May, 1821, were come to by the congregation or their elders, relating to the election of ministers to the Low Meeting-house. By these Resolutions it was declared, that no person could be admitted as a candidate unless he *had been educated for, and licensed by, the Established Church of Scotland. Such Resolutions, it was said, were inconsistent with the idea that such a qualification as the Resolutions required was recognised by the congregation from the beginning. I cannot admit the force of that argument. It is obvious that it may have been intended for a much more limited purpose than that of introducing, for the first time, ministers of a totally different denomination from Presbyterians. At all events, I cannot, without more explanation than has been offered me, give to these Resolutions the sweeping effect which the defendants' arguments require me to do.

Some points of minor importance were pressed upon me, but, with the view which I take of the case of *The Attorney-General v. Munro*, in its bearing on the case now before me, it does not appear to me that I can usefully entertain the consideration of any other points than those I have already noticed.

With respect to the trustees, the opinion I have expressed respecting the position of Mr. Murdoch involves in it, as a consequence, that the trustees who have taken part with him against

the plaintiffs have in fact committed, or supported Mr. Murdoch in committing, a breach of trust. But I have felt bound to consider, especially with a view to the question of costs, whether the case is not one in which Mr. Murdoch and the trustees may not have been justified in saying that they were entitled to have the opinion of the Court upon the case, and in which they ought not to be charged with the costs of obtaining that opinion. My conclusion, however, is, that the trustees who have taken part with Mr. Murdoch ought to be removed, and new trustees appointed in their stead; and that the costs *ought to follow the event of the suit, and be paid by Mr. Murdoch and the trustees who have taken part with him. My conclusion upon this point is founded upon this—that the real question between the parties has been, not whether a minister who, by reason of his opinions, was disqualified for being a minister of the Established Church of Scotland, was qualified for being a minister of the Low Meeting-house at Berwick; but whether Mr. Murdoch, by adhering to the Free Church, had become disqualified for the ministry of the Established Church of Scotland. In this view of the case there is nothing to distinguish the present case from *The Attorney-General v. Munro*, either upon the question of removing the trustees, or upon the question of costs.

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Upon the declaration to be contained in the decree, I have had great difficulty; for the evidence does not fully satisfy me that the foundation deed of the Low Meeting-house requires that the minister should be a minister of the Established Church of Scotland, provided his opinions, upon all matters of doctrine, discipline, and practice, do not disqualify him from being such minister; but I see no means of securing the due performance of the trusts of the Low Meeting-house, except by requiring that the minister shall be a minister of the Established Church of Scotland. He may be such minister *de facto*, and yet be disqualified for being a minister of the Low Meeting-house at Berwick; but I think the congregation of the Low Meeting-house are entitled, as the only means of securing their rights, to a declaration, that the minister of the Low Meeting-house must be a minister of the Established Church of Scotland.

[On appeal, the above decision was affirmed by KNIGHT BRUCE and LORD CRANWORTH, L. JJ., as reported in 1 D. M. & G. 86.]

TOWNSEND v. MARTIN.

(7 Hare, 471—472.)

1849.
Feb. 23.WIGRAM,
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A bequest of 5,000*l.* Consols, with a direction, that, if the testatrix should not have sufficient stock to answer the legacy, her executors should, out of her residuary estate, purchase enough to make up the deficiency: Held to create a specific, and not a merely demonstrative legacy.

THE will of Lucy Sutherland, dated in 1842, contained several specific legacies of different sums of 3*l.* 10*s.* per cent. Stock standing in her name, followed by a bequest of Consols in these words: "I give and bequeath the sum of 5,000*l.* Bank 3*l.* per cent. Consolidated Annuities unto all and every the children of the late Henry Bonham of Portland Place, who shall be living at the time of my decease (except Lady Garvagh and Mrs. Peters, and the eldest son), equally to be divided between them, share and share alike." Immediately after this bequest was the following direction: "And I direct, that, if at my death I shall not have sufficient stock standing in my name to answer the several legacies hereinbefore given by me as in that stock, that my executors and trustees do, out of my residuary estate, purchase sufficient to make up the deficiency." The testatrix bequeathed various other legacies by her will and codicils. There was more than sufficient Consols belonging to the testatrix at her death to satisfy the said 5,000*l.* legacy. On the cause coming on for further directions, the children of Henry Bonham presented their petition, suggesting that the assets were insufficient for payment of the legacies in full, and praying that the legacy of 5,000*l.* Consols, and the dividends which had accrued, might be transferred and paid to them.

The question was, whether the legacy of 5,000*l.* Consols was a specific legacy, or whether it was merely demonstrative.

Mr. Kenyon Parker and *Mr. Hetherington* appeared for the children of Henry Bonham.

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The *Solicitor-General*, *Mr. C. P. Cooper*, *Mr. Wood*, *Mr. Goldsmid*, *Mr. Fooks*, *Mr. G. S. Moore*, and *Mr. E. G. White*, for the other parties.

[*Hoskins v. Nicholls* (1) and other cases were cited.]

THE VICE-CHANCELLOR said, he was of opinion the result of the authorities was, that this legacy must be held to be specific. There was good reason for such a construction. Although a mere

gift of a certain sum of stock, as in the first part of this bequest, did not alone make the legacy specific, yet a gift of a sum of stock, with a direction that if the stock should not be in existence, the legatee should have an equivalent sum of money, or, as in this case, that the deficiency in the sum bequeathed should be made up, pointed to the consequence, that, on a failure of the stock, in the absence of any provision for that event, the legatee would either wholly or in part have lost the benefit of the gift.

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MOWER v. ORR.

(7 Hare, 473—477; S. C. 18 L. J. Ch. 361; 13 Jur. 421.)

A testator, by a will made since the Wills Act (7 Will. IV. & 1 Vict. c. 26), gave to his son, a residuary share of his estate. The son died after the Act came into operation, and before the date of the will, leaving children: Held, that under sect. 33 of the Wills Act, the gift took effect, although, according to the law prior to the statute, there would have been no effectual devise or bequest.

1849.
 May 8.

WIGRAM,
 V.-C.
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Where a testator by his will gave his estate, including copyhold of inheritance, leaseholds, merchandise, money in the funds, and cash, to his children and grandchildren, in twenty aliquot shares, and directed some of the shares to be invested in the Government funds for the infant legatees, and requested his executors on his death to get his property together and divide it, it was held, that the will must be taken to direct a sale and conversion of the copyhold estate.

THE testator, W. Orr, of Islington, Middlesex, by his will, dated in 1844, after stating that his property consisted of copyholds, leasehold houses, merchandise in Australia, cash at his bankers and in the public funds, and that, as it was so scattered about and not realised, he could not state what he should die worth, proceeded:

“I have, therefore, decided to divide it into twenty shares, and I dispose of the same as follows, at my death: To my son William Morgan Orr, of Hobart Town, six shares; to my son Robert Orr, of Islington, six shares; to my son Alexander Orr, of Port Philip, South Australia, four shares; and the remaining four shares I bequeath as follows: Two shares, part thereof, I give to my daughter Mary, the wife of J. Mower; and two shares, to be invested in the Government funds, for the use of the children of J. Mower by my daughter Mary, to be invested, as aforesaid, in the names of my executors hereafter named, the interest of which to be appropriated to their education, and the principal to be divided amongst them as they severally attain the age of twenty-one years.”

The testator appointed his sons William Morgan Orr and Robert

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Orr his executors, adding a request that they would, on his death, use their exertions to get his property together, and divide it according to his intention therein expressed.

William Morgan Orr, the son, died in November, 1848, in Van Diemen's Land. He left children.

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Mr. Roundell Palmer and *Mr. Mott*, for the plaintiff, and *Mr. Torriano*, for the personal representatives of William Morgan Orr, referred to the case of *Winter v. Winter* (1) and the cases there cited. * * *

Mr. W. Morris and *Mr. Frith*, for the heir-at-law of the testator, who was the eldest son of William Morgan Orr, and also for other members of the family, argued that * * there was no valid "devise or bequest," and, therefore, no devise or bequest which could either lapse or take effect under the law as it existed before the statute. The case of *Wild v. Reynolds* (2), before Sir Herbert Jenner Fust, was also adverted to, as conflicting with *Winter v. Winter*. * * *

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THE VICE-CHANCELLOR :

I regret that the case of *Winter v. Winter* was not carried before the Lord Chancellor, if any doubt was entertained respecting it. It appeared to me, and I still think, that the words of the statute are large enough to take in all cases in which the issue intended to be benefited dies leaving issue, and any of the issue survive the testator, if the will was made, and the party for whom the gift was intended, died after the Wills Act came into operation. I do not think the construction of the word "lapse" should narrow the effect of the rest of the clause. I did not decide the case of *Winter v. Winter* without consulting with an eminent Judge upon the point. In the case in the Ecclesiastical Court, the children died before the Wills Act came into operation, and the decision in that case is not, therefore, inconsistent with *Winter v. Winter*. It appears to me, that the construction I then put upon the statute gives effect to the intention of the testator and of the Legislature ; and I see no reason to depart from that construction.

A second question was, whether the real estate of the testator,

(1) 71 B. R. 122 (5 Hare, 306).

Mar. Courts, vol. 5, p. 1.

(2) Notes of Cases in the Eccles. &

which was copyhold of inheritance, part holden of the manor of Canbury or Canonbury, in the county of Middlesex, descendible in gavelkind, and part of the manor of Kimpton or Koe Kennington, in the same county, descendible as at common law, ought under the trusts of the will to be sold, or whether the legatees or parties beneficially entitled under the will, took the real estate as unconverted. Upon this point,

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Mr. Frith, for the customary heir of W. M. Orr, argued that the legal estate in their several shares of the copyholds *was devised to the several children of the testator, to whom the same was given by the will: *Patton v. Randall* (1); and therefore, that the infant defendant, the only son of W. M. Orr, as his sole customary heir in both manors, was entitled to the undivided 6-20ths of the copyholds. The direction to the executors to get the property together was not applicable to the real estate, and the directions that they should divide or invest it, did not necessarily imply a sale: *Cornick v. Pearce* (2).

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Mr. Roundell Palmer distinguished this case from that of *Cornick v. Pearce*. He cited, also, *Rigden v. Pierce* (3).

The VICE-CHANCELLOR said, he was of opinion that the testator in this case must be understood as directing the conversion of his copyhold estate into personalty. The division of the entire property into a number of shares, and the directions contained in the will as to the investment and disposition of some of such shares, precluded the supposition that the testator intended the copyholds should remain unsold. In *Cornick v. Pearce*, it appeared to him that the purposes of the will would, in the circumstances of that case, be effected without a conversion of the whole estate. There was a plain direction that the estate should be enjoyed in specie until the division was to take place; and the literal construction of the will did not require a sale of the whole estate, either for the purpose of the division or the settlement of a moiety.

(1) 25 R. R. 195 (1 J. & W. 189).

(3) 23 R. R. 242 (6 Madd. 353).

(2) See next case.

1848,
Dec. 5.

CORNICK v. PEARCE (1).

(7 Hare, 477—481; S. C. 12 Jur. 997.)

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[477]

A testator gave his real and personal estate to trustees, upon trust to apply the rents, issues, and proceeds for the benefit of his two daughters, with a direction, on the youngest attaining twenty-one, to divide the whole into two equal moieties, of which the testator gave one moiety to his two daughters equally, and directed the other to be placed out upon Government or real securities, and the dividends and interest thereof to be paid to the daughters for their lives, and upon their death, the said monies and effects to be divided amongst their children: Held, that there was no conversion by the will, of the moiety of the real estate devised to the daughters on the youngest attaining twenty-one.

A suit for the execution of the trusts of the will of J. M. Hansford, instituted by the trustees. The will was as follows:

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"I give, devise, and bequeath unto my two friends Jesse Cornick and John Budden, all and every my freehold, copyhold, leasehold and other estates, of whatever tenure or holding I possess and enjoy the same, situate, lying, and being in the parishes of Bradpole or Loders, or elsewhere in the county of Dorset, and also all my stock in trade, cattle, implements in husbandry, household *goods and furniture, linen, china, monies, securities for money, and all other my personal estate and effects of every sort and kind: To hold the same and every part thereof unto the said Jesse Cornick and John Budden and to the survivor of them, his heirs, executors, administrators and assigns, according to the different natures and qualities of the same respectively; upon trust, nevertheless, to receive and take the rents, issues, and proceeds thereof, and to apply the same to the best advantage, for the maintenance and advancement in the world of my two daughters, until the youngest of them shall attain her full age of twenty-one years; and when and as soon as my said youngest daughter shall have attained her said age of twenty-one years, then upon trust to divide the whole of my said estate and effects into two equal moieties, one moiety of which it is my will shall be divided equally between my two daughters, share and share alike; and the other moiety I direct my trustees to place out on Government or real securities, the dividends and interest of which, I give and direct to be paid to my two daughters, during the term of their natural lives; and upon the death of my said daughters, then upon trust to divide the said moneys and effects amongst the children equally. If either my

(1) *Holloway v. Holloway* (1888) 60 *Hargreave's Contract* (1883) 25 Ch. D. L. T. 47; *In re Garnett, Orme and* 595, 53 L. J. Ch. 196, 49 L. T. 655.

said daughters shall die leaving a husband surviving, then it is my will and desire that the husband shall enjoy her share for his life, and upon his decease such share shall come back to the surviving daughter, her executors, administrators and assigns.”

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After giving some specific legacies, the testator directed that all his estate, both freehold and personal, should be subject to the payment of his debts and funeral and testamentary expenses; and he appointed the said two persons his executors.

The testator died in 1837, leaving his two daughters Susannah and Phœbe surviving; Phœbe, the younger daughter, attained twenty-one on the 9th of April, 1839. Both daughters married, and died leaving their husbands surviving. Phœbe died in December, 1840, leaving Susannah her heiress-at-law, and Susannah died in October, 1841, leaving her infant daughter Susannah Axe Pearce her heiress-at-law.

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Phœbe and her husband had, by a postnuptial settlement, made in October, 1840, conveyed an undivided fourth part of the real estate to a trustee, upon trust for the husband and wife, for their respective lives, with remainder as they or the survivor of them should appoint, and in default of appointment, for the husband in fee. The Master found that no appointment had been made.

Mr. Prior, for the plaintiffs.

The *Solicitor-General* and *Mr. Kinglake*, for the husband and administrator of Susannah, argued that the whole of the real estate must be taken as converted into personalty, upon Phœbe attaining her majority in April, 1839. The direction to divide the estate at that time, and invest a moiety in Government securities, necessarily implied a direction to sell.

Mr. Wood and *Mr. Batten*, for the infant daughter and heiress of Susannah, denied that, by any necessary implication, a sale of the estate was directed. The settlement contemplated by the testator might be effected by a charge on the estate, without a sale, or by a sale of a moiety. They also contended, that the settlement made by Phœbe, in October, 1840, was voluntary and ineffectual: **Holloway v. Headington* (1); and that, at her death, Susannah took the other fourth part of the real estate which had now also descended upon the infant.

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Mr. G. L. Russell, for the husband and administrator of Phœbe,

(1) 53 R. R. 75 (8 Sim. 324).

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relied on the fact, that the conveyance of October, 1840, was executed with such formalities as would have passed the legal estate of the wife at law, and that the case was one in which equity would follow the law.

THE VICE-CHANCELLOR:

I do not think the argument is conclusive, that the property must be held to be converted, because, after a division of the estate into moieties, there is a direction to invest one moiety. The direction to invest arises out of and is rendered necessary by the settlement of the property which the testator had in view. I think the ground upon which I must decide this case is very plain. I must take the words as they stand, and abide by them, unless there is something in the will which is repugnant in their strict meaning. The property is to be enjoyed in specie, and at a certain period there is to be a division of one moiety between the two daughters. As to the remaining moiety, the trusts are to invest it. If the testator had said that the moiety of the estate was to be sold for the purpose of the investment, the case against the conversion of the other moiety would have been too clear to have admitted of an argument. Construing the words strictly, there is no direction which requires a conversion, except as to the moiety which is to be settled. As to that moiety alone, is there an act to be done which makes a sale necessary? The words apply only to the moiety after the division has been made.

[481] It is very improbable that the testator contemplated the sale of part and not of the whole estate; but the literal construction of the will does not make it necessary to imply a direction to convert the whole.

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June 2, 4, 5,
6, 7.

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Affirmed on
Appeal.

1850.
Feb. 13.

Lord
COTTENHAM,
L.C.

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WARING v. THE MANCHESTER, SHEFFIELD, AND
LINCOLNSHIRE RAILWAY COMPANY.

(7 Hare, 482—498; S. C. 18 L. J. Ch. 450; 14 Jur. 613; affd. 2 H. & Tw. 239.)

The plaintiffs contracted to execute works on a railway, to the satisfaction of the engineer of the Company, by the 1st of October, 1848, making such alterations in, and hastening the works, as the engineer should direct; and the Company agreed to pay for such works a stipulated sum, and thereof to pay a proportionate part monthly, according to the value of the works which the engineer should certify to have been done, retaining 5l. per cent. of the certified amount; and the contract provided that all disputes as to fact, discretion, or opinion, were to be referred to the absolute determination and award of the engineer, whose decision was to be final, and without appeal; and if the engineer should be dissatisfied with the works, the

Company might take possession of and complete the same, at the expense of the plaintiffs, after giving them fourteen days' notice. The works were delayed, with the assent of the Company, but in January, 1849, the engineer required the works to be prosecuted with increased speed, and insisted that the line should be opened on the 1st of June. On the 21st of May, the Company gave notice to the plaintiffs, in the terms of the contract, that they would, at the expiration of fourteen days, take possession of and proceed with the works. The plaintiffs thereupon filed their bill to restrain the Company from taking such possession, alleging, that when the plaintiffs were proceeding with due speed, the engineer had, by the authority of the directors, ordered that the works should be delayed for a considerable time; that the Company had waived the completion of the works by October, 1848; and that the plaintiffs were only bound to carry on and complete the same at a rate computed on the footing of the original contract, and modified by the delay which the Company had required; that the engineer had, by the order of the directors, given monthly certificates for less than a fair proportion of the contract sum, according to the work actually done at such times; that a large sum was due to the plaintiffs, which had not been paid; and that the Company had not, in fact, paid all the sums which had been certified. The bill denied any default on the part of the plaintiffs, and charged that the notice was given for the fraudulent purpose of avoiding the payment of sums due to the plaintiffs, and of ejecting them from the works, and procuring other persons to finish the works at an earlier period than the plaintiffs were bound to do. The bill also prayed an account of what was due to the plaintiffs from the Company in respect of the works, and an injunction to restrain the Company from proceeding against the plaintiffs for penalties under the contract, on the ground of their non-completion.

Upon demurrer by the Company, it was objected, first, that the contract had not been completed on the part of the plaintiffs, and that it was not a contract of which, as against the plaintiffs, if they had been defendants, the Court could have decreed a specific performance; and, secondly, that the entire control of the works was by the contract given to the engineer, whose decision was to be without appeal; but,

Held, that the plaintiffs were entitled to the aid of a court of equity, and that the demurrer must be overruled.

It is no objection to relief, in such a case, that it depends on a variation of or departure from the contract made by the directors and officers of an incorporated Company, such variation or departure not being made under the authority of their common seal.

THE bill stated an agreement, dated the 2nd of March, 1847, made between the plaintiffs and the defendants, and under the common seal of the latter, whereby the plaintiffs contracted to construct and lay down a specified portion of the railway, extending for about 10 miles, according to the directions from time to time, and in all particulars to the complete satisfaction of John Fowler, the then engineer, or the engineer for the time being of the Company, in the order, manner, and form shown upon the specification and working plans then prepared by John Fowler, and all such future and other plans, drawings, and documents as might thereafter be furnished by the engineer for the time being, in his

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discretion, within the prescribed limits of deviation ; and that the whole of the said works should be completed on or before the 1st of October, 1848, time being thereby admitted to be of the essence of the contract. The contract provided, that the plaintiffs should also, within the same time, do such works as might be required by the engineer or his deputies or assistants, if such works, although not mentioned in the contract or specification, might be reasonably inferred therefrom, without any extra charge to the Company ; and that any alterations, additions, or omissions, desired by the Company or their engineer, during the progress of the works, however extensive or important the same might be, should be complied with and executed by the plaintiffs, the extra expense of saving thereby occasioned to be ascertained by the engineer of the Company, according to his uncontrolled discretion, and added to or deducted from the gross sum payable to the plaintiffs ; and nothing contained in the contract as to the alterations, additions, or omissions, was to affect the covenant as to the time of completion of the works. If the works were not completed by the time named, the plaintiffs were to pay 150*l.* per diem as stipulated damages, from the last day thereby limited, until the day when the engineer of the Company should certify the whole to be completed, such certificate not to be unreasonably withheld or delayed ; and the foregoing provision was not to prevent the Company from recovering further or other damages for such non-completion. If the plaintiffs should not in every respect abide by and fulfil the stipulations of the contract and the specification, (save as the same might be varied by the direction

[*484] *of the Company as aforesaid,) or in case of delay or default, or if they should not complete the works within the time limited, and to the entire satisfaction of the engineer, the Company were to be at liberty, after the expiration of fourteen days' notice to the plaintiffs, to purchase and provide all necessary materials, and employ competent workmen to prosecute and complete or expedite the prosecution or completion of the works ; and the Company might retain and deduct the costs of such materials and their expenses and damages arising from any such breach of the contract, from any money which might be payable to the plaintiffs under the contract. In case of the exercise of such power by the Company, the plaintiffs were not to hinder the Company from prosecuting or completing the works, or from using or applying for that purpose any materials or implements belonging to the plaintiffs which might be near the works, for the loss, wear, and tear of, and

damage to which materials or implements, the Company were not to be answerable. The materials and things brought upon or near the works, to be used thereon, with some exceptions, were not to be removed until the completion of the contract, and were, until then, to be considered as equitably mortgaged to the Company, for the security of their payments and advances for the full performance of the contract. The Company were to pay to the plaintiffs 112,000*l.* (subject to the stipulations as to increase and diminution) for the execution of the works, by monthly instalments, as the engineer should, upon being furnished by the plaintiffs with an account in writing, at the end of any month, certify to be the proportionate value of the materials actually used and worked up, and of the work actually done by the plaintiffs within the said month, the Company retaining 5*l.* per cent. of such certified value, until the fulfilment of the contract. In case possession should not be given of any lands essential *to the prosecution of the works, such delay was not to prejudice the contract, but the time for the completion of the works was to be enlarged for such length of time as, in the opinion of the engineer, might be lost to the plaintiffs by reason of not having possession. And lastly, it was agreed between the parties, that if any dispute should arise in respect of the said matters, whether of fact, discretion, or opinion, the same was to be referred to the absolute determination and award of the said John Fowler, or other the engineer of the Company, and his decision was to be final and conclusive, and without appeal; and in case the engineer should refuse to act as such referee, then each of the parties was to appoint an arbitrator, who were to choose a third person, and the decision of such three persons, or any two of them, was to be in like manner final and conclusive.

Among the general conditions and specifications referred to in the contract, it was provided, that the engineer should at all times have power to direct the contractor to facilitate or push the works, whether partially or wholly, and of whatever kind or nature, and the plaintiffs were, immediately on such directions being given, to increase the number of their workmen and carry the same into effect.

The bill stated, that, from the time when they commenced the works down to about the 12th of November, 1847, the plaintiffs proceeded in the execution thereof in such a manner as would have insured the completion of the works before the time limited by the contract; and that, on the 1st of November, 1847, the value of the

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works actually done by the plaintiffs, and for which they were then entitled to receive payment, subject to the deduction of 5l. per cent., amounted to more than 21,000l., and that the amount actually paid to *the plaintiffs by the Company up to the same time, amounted only to 17,500l.; and, although the plaintiffs had regularly furnished the Company with a monthly statement of the works done, they were unable to obtain from the Company any further payment; that, having entered into the agreement on the faith of the Company duly observing the stipulations on their part, and relying on the payments being regularly made, the plaintiffs were exposed to serious loss and inconvenience, inasmuch as they had every week to pay very large sums in wages and other expenses; that the plaintiffs had an interview on the subject with Fowler, on the 12th of November, 1847, and the plaintiff Henry Waring then complained that the sums paid by the Company had been so inadequate to the work done, and requested Fowler to give his certificates for the future on a more just and liberal scale, to which Fowler replied, that he would see what he could do; that Fowler stated, that the Company did not require the completion of the works within the time specified, and that he authorised the plaintiffs to make arrangements for proceeding more slowly in the execution thereof, and in particular gave orders for delay as to certain part of the works, although it would have been advantageous to the plaintiffs if they had proceeded at the rate originally required; that, notwithstanding such diminished rate of progress, the sums actually paid by the Company from time to time, in respect of the works, fell very far short of what was actually due to the plaintiffs; that, in October, 1848, the Company was very much embarrassed, and unable to provide money for the payments falling due; and that, upon the representations of the directors, made at a meeting on the 24th of October, 1848, which the plaintiffs and other contractors had been invited to attend, that the Company was unable to continue cash payments, and, at the request of the directors, the plaintiffs *consented to receive certain bills of exchange and debentures, not in satisfaction, but by way of security for part of the sums falling due to them from the Company.

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The bill then stated, that, in January, 1849, the plaintiffs received a letter from Fowler, urging the completion of the works, ready for the Government inspectors, on the 13th of May, 1849. The bill alleged, that the plaintiffs, immediately on receiving such

letter, proceeded with all possible speed, and at a more rapid rate than would have been necessary for completing the works within the contract time, if such rate of proceeding had been pursued from the commencement. On the 16th of February, Fowler wrote to the plaintiffs a letter, expressing his dissatisfaction with the state of the works. On the 18th of March, Fowler again wrote to the plaintiffs, stating that he should be glad to hear they had completed their arrangements for opening the line on the 1st of June, 1849. The bill stated some other letters which passed between Fowler and the plaintiffs, the former complaining that the work was not sufficiently advanced, and the latter stating that it would be impossible to accomplish it by the time named, and complaining that the payments had not been duly made. The last of the letters of Fowler, dated the 14th of May, stated that it was clear that the Company must take the work into their own hands; and, at an interview on the 22nd of May, Fowler said he was determined to have the line opened by the middle of July.

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The bill set forth a notice, dated the 21st of May, 1849, from the solicitors of the Company to the plaintiffs, which stated, that, owing to the various neglects, defaults, and breaches of the contract, by the plaintiffs, therein alleged, the Company would, immediately after *the completion of fourteen days from the time of notice, purchase materials and employ competent persons for the completion of the contract, and hold the plaintiffs liable for the damages the Company might thereby sustain; the notice also required the plaintiffs not to remove their plant or materials.

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The bill denied all the breaches of contract stated in the notice, and alleged that the plaintiffs had done certain extra works, for which they had not been paid by the Company; and that, on the 1st of May, 1849, the plaintiffs had executed works under the contract, to the amount of 102,786*l.* 2*d.*, subject to the deduction of 5*l.* per cent.; and that the extra work amounted to the sum of 8,982*l.* 15*s.* 3*d.*; and that the plaintiffs had received, on account of such works, only 98,800*l.* or thereabouts, and 2,000*l.* in debentures, and that more than 10,000*l.* was due to the plaintiffs; but that Fowler unjustly and unreasonably withheld his certificates in respect thereof.

The bill charged, that, under the circumstances, the Company had waived the completion of the contract by the 1st of October, 1848, and, in consequence of such waiver, the plaintiffs were only bound to carry on and complete the works at a reasonable rate,

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and within a reasonable time, computed on the footing of the original contract, but modified by the delay which had taken place at the instance and with the assent of the Company; and that the plaintiffs were only bound to proceed with the works at such a rate of progress as would, if adopted from the commencement, have sufficed for the entire completion of the works within the contract time.

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The bill charged, that the notice was given for the fraudulent purpose of evading or postponing the payment *of the sums due to the plaintiffs under the contract, and for the purpose of ejecting the plaintiffs from the works, and procuring other persons to finish the same at an earlier period than the plaintiffs, under the circumstances, were bound to do; that the engineer had, for such purposes, fraudulently avoided giving the plaintiffs any precise and definite instructions as to the increased amount of power or materials which he required them to employ; that, at the time of giving the notice, the plaintiffs had not made any default in carrying on the works; and that, until the 8th of January, 1849, the plaintiffs had not received any instructions to expedite the same, but the same had, ever since that date, been carried on at a rate of progress considerably exceeding what would have been necessary if the previous delay, at the instance of the Company, had not taken place; that the plaintiffs had always had on the works an ample supply of plant and materials; that the Company was unwilling or unable to pay the sum due to the plaintiffs, and, in order to defraud them thereof, Fowler, by the order of the directors, had unjustly and unreasonably withheld the certificates, and had wilfully and knowingly given certificates for smaller sums than were really due; and had, by the order of the directors, unjustly withheld the certificates, and given such insufficient certificates, for the purpose of compelling the plaintiffs to complete the works within an unreasonable time, and to carry on the same at a greater rate than that at which they were bound to carry on the same, having regard to the said circumstances.

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The bill prayed, that it might be declared that the plaintiffs were not bound by the stipulations of the contract of the 2nd of March, 1847, as to the completion of the works within the time thereby limited; and that the Company had waived all right to insist on any *penalty, or forfeiture, or damages, by reason of the non-completion of the works within such time; that an account might be taken of what was due to the plaintiffs from the Company in respect of the

works included in the contract and the extra works; and that the Company might be restrained by injunction from removing the plaintiffs from the works, or otherwise disturbing or hindering them in their execution, and from taking possession of the plaintiffs' plant and materials, or furnishing or providing materials and implements, or engaging or employing agents or workmen for executing the works, or prosecuting or executing the same,—from exercising the rights given to the Company by the contract, with reference to the materials or implements brought by the plaintiffs upon the works, from insisting on any rights of forfeiture or penalties under the contract, by reason of the non-completion of the works within the said time, and from commencing or prosecuting any action or suit against the plaintiffs, for the purpose of enforcing any such forfeitures or penalty, or of recovering any damages on account of the non-completion of the works within such time.

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The Company demurred to the bill, for want of equity.

The *Solicitor-General* and *Mr. Osborne*, in support of the demurrer, contended that there was no case for the interference of a court of equity,—first, because the agreement was one of which the Court could not decree a specific performance, and in which, therefore, the Court would not interfere against one of the parties while it could give no relief to the other: *Kemble v. Kean* (1), *Kimberley v. Jennings* (2), *Ranger v. The Great Western Railway Company* (3). Secondly, it appeared *by the bill that the power of deciding upon the rights and duties of the parties, in the execution of the terms of the contract, had been conclusively committed to the engineer, and that the decision of the engineer had, in fact, been adverse to the plaintiffs on every point: *Ranger v. The Great Western Railway Company* (4), *Heap v. Archbishop of Canterbury* (5). Thirdly, that any departure from the agreement, in order to be binding upon the Company, must be, like the agreement itself, under the common seal of the corporation, or authorised by some instrument under such seal: *Mayor &c. of Ludlow v. Charlton* (6). * * *

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Mr. Wood and *Mr. Erskine*, for the plaintiffs, on the first point which had been urged on behalf of the defendants, cited

(1) 38 R. B. 125 (6 Sim. 333).

(2) 38 R. B. 130 (6 Sim. 340).

(3) 1 Rail. Cas. 50; see now 5 H. L. C.

72.

(4) 1 Rail. Cas. 48, 49; see now 5 H. L. C. 72).

(5) Cited, 1 Rail. Cas. 49.

(6) 55 R. B. 794 (6 M. & W. 815).

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Dietrichsen v. Cabburn (1) and *Storer v. The Great Western Railway Company* (2). On the second point,—that the absolute control of the works, without appeal, had been committed to the engineer,—they relied on the allegations in the bill, of the partial and corrupt conduct of the engineer, which had been deemed a sufficient ground of equity in the case of *M'Intosh v. The Great Western Railway Company* (3). On the objection, that the waiver or alteration of any of the terms of the contract could only be under the common seal of an incorporated Company, they cited *Faviell v. The Eastern Counties *Railway Company* (4) and [other authorities].

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THE VICE-CHANCELLOR :

It is impossible to read Lord COTTENHAM'S judgment, in the case of *Dietrichsen v. Cabburn* (1), and to suppose he intended to throw any doubt on what was considered the settled law of the Court. The Court does not give relief to a plaintiff, although he be otherwise entitled to it, unless he will, on his part, do all that the defendant may be entitled to ask from him ; and if that which the defendant is entitled to, be something which the Court cannot give him, it certainly has been the generally understood rule, that that is a case in which the Court will not interfere. In the common case of a bill for specific performance by a purchaser, the Court will not direct a conveyance unless the plaintiffs will pay what is due. The Court can decree that, and the Court will, therefore, in that case, give relief ; but if that which the plaintiff is to give on a bill for specific performance be something to be done at a future time, and which the Court cannot enforce, the understood rule has always been, that the Court in that case will not give relief, and I do not think the LORD CHANCELLOR meant, in the case of *Dietrichsen v. Cabburn*, to throw any doubt whatever on that rule. If, in the present case, the allegations came to this, that the plaintiffs had not done all which on their part they were bound to do, and could not at once perform it, I apprehend the case would fall within the general rule. It is, however, contended, that, according to the allegations in the bill, the plaintiffs, up to the time of complaining, had performed all they were bound to *do ; but, if this be so, still there remains behind something to be done by the plaintiffs ; and if that which remains to be done by them hereafter be something the Court

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(1) 78 B. R. 17 (2 Ph. 52).

-758).

(2) 60 B. R. 23 (2 Y. & C. 48).

(4) 76 B. R. 615 (2 Ex. 344).

(3) 79 B. R. 359 (2 De G. & Sm.

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cannot secure to the defendants, I cannot help thinking the case may fall within the observations of the VICE-CHANCELLOR in *Ranger v. The Great Western Railway Company* (1). The bill asks for an account, but if the account be inseparably connected with the general subject of the contract, then, unless I can decide the general question in the plaintiffs' favour, the case of the account will not help them. If I am to hold that this is a contract which the Court cannot specifically perform, it becomes a material question, whether the account is inseparably connected with it.

One of the objections taken to the account being decreed is, that Mr. Fowler and the engineers for the time being were selected by the parties themselves to be the sole judges; and I think, that if it now appeared that Mr. Fowler, or the engineers for the time being, in the discharge of their duties, had honestly addressed themselves to the question of what was due, and in the exercise of their discretion had determined what was due to the plaintiffs, and accordingly given certificates of the sums the plaintiffs were entitled to, there would be no equity for this Court to interfere. In that case the judge whom the parties had selected would have decided the case, and from that judge there would, according to the settled rule, be no appeal. In such a case it would be as strong,—it cannot be stronger,—than the case of an arbitrator. If, however, the judge whom the parties have agreed shall settle the question between them either refuses to decide the question, or acts corruptly in forming his decision, then, however the parties may *have agreed that the judgment of a given individual shall be conclusive, and that the works shall not be ascertained by measure and value, the defendants cannot be heard to say that the corruption of their own agent, or his refusal to act, is to deprive the plaintiffs of their due remuneration for the work which they have done. If, in such circumstances, there be no mode of ascertaining the amount of the work but measure and value, the party must be entitled to be paid according to measure and value.

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The question is, whether the allegations of this bill do or do not amount to this, that the selected judge, Mr. Fowler, or the other principal engineer, have done one of two things: that they have either not addressed themselves to the question of what was due, or, having done so, they have, for the corrupt purpose alleged in the bill, given a certificate for less than in point of fact they knew at the time was due to the plaintiffs; and whether it is to be considered as a case in

(1) 1 Rail. Cas. 50; see now 5 H. L. C. 72.

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which that fact would be conclusively proved at the hearing of the cause, supposing the bill to be taken *pro confesso*, or the defendants to have admitted by their answer the truth of the allegations.

I entirely accede to the argument, that a general charge of fraud, coupled with a special case, which is intended to make out the fraud, will not be treated as of any importance unless the particular facts alleged amount to a fraud; but the allegation of a fraudulent purpose in doing a particular act is a different thing from a general and vague charge of fraud. It certainly appears to me, that, on general demurrer, I must hold these charges of fraud to be in form sufficient. The value of the allegation is another question.

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If the allegation, that certificates have been fraudulently *withheld, be sufficient as a foundation for the interference of this Court, the truth of the allegation must be in some manner tried. There must be an account taken, or some mode must be adopted for ascertaining the amount of what is due to the plaintiffs. The question may be, whether that account is to be taken at law,—whether the measure of damage is to be ascertained at law, or in this Court.

The effect of what has been done is, that the plaintiffs are deprived of the right they had at law, under the contract, to proceed on the certificates; and they are placed in this difficulty, that whereas they were entitled from month to month to have the amount due to them ascertained, the whole of the work has become buried in a number of months, and they have to go back and ascertain the amount due to them under great disadvantage.

Another difficulty suggested in the way of relief in this case is, that it is not complete: that what is asked by this bill is only part of the right. If the case can be founded on the question of account, independent of jurisdiction in respect of fraud, the proposition may be, that every month a bill might have been filed to ascertain what was due to the plaintiffs. I am not certain that the LORD CHANCELLOR has not gone the length of saying that that might be done, in one of the earliest cases he decided, when he was Master of the Rolls. A bill was filed to restrain the infringement, by one of the firm, of the partnership contract during its continuance. Lord COTTENHAM in that case said, that the partnership was to go on for a certain number of years, and if, in order that it may go on beneficially to both parties, there is some one thing that the Court can enforce, there is no reason *why the Court should not enforce that one thing, and still leave the partnership undisturbed (1).

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(1) See *Taylor v. Davis*, 41 R. R. 195 (4 L. J. (N. S.) Ch. 18).

Suppose the case of a partnership, in which one partner is to have a salary allowed to him in proportion to the amount of the profits made, and that, by the contract, the partnership accounts, are to be settled at the end of every six months, with the view of showing the state of the profit and loss account,—if the other partner were to refuse to come to any settlement of accounts so as to ascertain the amount of the allowance, the Court, by refusing to interfere, might permit the party to be deprived of his allowance until the end of the partnership.

If, in this case, all that the plaintiffs are to do had been done, the case of *M'Intosh v. The Great Western Railway Company* is an authority that the plaintiffs are entitled to the assistance of a court of equity. There has, it is true, been no suppression or misrepresentation of facts; and, perhaps, the wrong of which the plaintiffs complain, though a moral fraud, is not a fraud in the technical sense of the word; and, if the plaintiffs were under no difficulty in enforcing their rights at law, it might not be a wrong which would give this Court jurisdiction.

THE VICE-CHANCELLOR :

I have referred to the cases which were mentioned in argument, and particularly to the case of *M'Intosh v. The Great Western Railway Company*; and, in order to try the question now before me, I have supposed, first, *that all the works contracted to be done by the plaintiffs had been done, which then brings this case within that of *M'Intosh v. Great Western Railway Company*; and upon that view of the case I have read the charges in the bill.

It appears to me that this case is not substantially distinguishable from *M'Intosh v. The Great Western Railway Company*; and I could not, therefore, allow this demurrer without disregarding that case, which, upon the best consideration I can give to it, is, I certainly think, well decided. The principle of the Court is, that, if a wrong be committed by the species of fraud suggested in that case, this Court has jurisdiction to give relief. I do not say to what extent it will go.

The only question, then, is, whether the fact, that the works are not complete, and that something remains to be done, makes any difference. It seems to me that it does not. There may be some inconvenience as to the number of cases in which the plaintiffs might have had occasion to file bills; they have, however, acquired a right which is perfect in itself, and of which right they have been

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deprived by the alleged acts of the defendants; and where there is an integral right, the fact that the whole dealings between the parties would involve something more, does not, according to the modern cases, constitute any objection to the interference of the Court as to that particular right. I am not sure whether the observations of Lord ELDON, as to having the entire transaction wound up by the suit, would have extended to this case.

I am of opinion, that the case is one in which the plaintiffs would be entitled to some relief. I am not called upon now to say what that relief will be. I follow the case of *M'Intosh v. The Great Western Railway Company*, in holding that this demurrer must be overruled.

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The plaintiffs moved for the injunction to restrain the Company from taking possession of the works and materials. The Company consented not to take the plant and implements belonging to the plaintiffs. The injunction was refused.

[The Company appealed, but the decision of the VICE-CHANCELLOR was affirmed by Lord COTTENHAM, L. C., as reported in 2 H. & Tw. 245, where his Lordship said:]

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Feb. 13.

THE LORD CHANCELLOR :

[2 H. & Tw.
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It appears to me that there is an ample allegation of equity in this case, whatever may be the result. Assuming the facts, which I must do for the purpose of this demurrer, to be as they are alleged, there is as great a fraud practised on individuals as could have been alleged, the transaction being, that the plaintiffs undertake works for the defendants to a very great extent,—of course, exhausting very much the means of any man, from the magnitude of the works to be undertaken,—on which 100,000*l.* are to be expended; and they enter into a contract, putting themselves entirely at the mercy of the Company, or the Company's agent, Mr. Fowler. Of course, this may be all fiction. I am only stating now what the bill alleges. The works are to be done, and certificates are to be granted. The result of all this is, that, from time to time, the contractors are to be paid for works which are actually done, *Mr. Fowler being the party who is to ascertain their being done and on whose certificates the Company are to be liable to pay. The plaintiffs are to do the works within a certain time; and, if they fail in the performance of the contract, most severe penalties are imposed

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upon them, and there are most stringent means for the Company to be reimbursed any loss they may sustain. There is not only 5*l.* per cent. retained out of the monies which the contractors would have to receive, but the Company have power to enter on the works done, and take whatever property they may find belonging to the contractors,—all the plant, carriages, and whatever there may be upon the premises they have a right to take. The works go on, and, owing to their own pecuniary embarrassments, they are unwilling to permit them to be proceeded with at the rate specified; and the bill alleges that the Company, or Fowler, who was their agent for the purpose,—whether mentioned in the contract or not, he acts for them, and they do not repudiate his acts,—occasionally, and at different times, desired them not to proceed so rapidly, and stated, as the reason, that there was not sufficient money coming to pay for the expense of so rapid an execution of the works. The plaintiffs relax, according to his directions. However, he asks them to go on with a particular portion at a much quicker rate than they ever intended to do. Everybody knows that a work of this sort, where it is accelerated, and to be done within a limited period, is much more expensive and much more inconvenient to the contractor than where a long time is allowed. The result of all this is, that, according to the terms of the contract, the plaintiffs get involved in forfeitures. Time passes by, and the work is not done. They say the certificates are withheld,—improperly withheld, according to their allegation; they are therefore deprived of the means of paying the expenses of the works. They have not received the money from the Company which they were entitled to receive; and the delay was occasioned, not by their acts, but by the acts of the Company or *their agent Mr. Fowler, who directs them not to proceed so rapidly, on account of the pecuniary difficulties of the Company. Then, without any apparent reason, and, whether with reason or not,—according to the bill, without any reason, and merely for the purpose of getting an advantage over the plaintiffs, and appropriating their money to the future operations of the Company,—they take a step which would have the effect, if supported, not only of forfeiture, depriving them of 5*l.* per cent. on the whole sum, but also depriving them of the benefit of the property which they had on the premises, which, in that case, they would forfeit and lose. They give them suddenly notice to determine the contract, which, if justifiable, would expose the plaintiffs to the enormous loss which, under the contract, must arise from that course of proceeding.

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In the present case, the plaintiffs positively allege, that there is money due to them to a considerable amount. The extra works, it is said, are not alleged to be done by order of Mr. Fowler. That is perfectly immaterial. Extra works are alleged to have been done to a certain amount, and the bill positively alleges that the plaintiffs are entitled to payment of a certain sum in respect of such extra works. That allegation necessarily comprises within itself everything which is essential to make it true. They would not be so entitled unless they followed the course prescribed by the contract. They were not bound to allege every particular fact which would possibly be a defence to their claim. They say, we did the work. They are not bound to allege that all these works were done in a workmanlike manner, and make other allegations which are necessarily implied. Where a party undertakes to do works in a particular mode, he undertakes to do them in a workmanlike manner. If they are to be done under the superintendence and direction of an agent, and if the contractor says he is entitled to a certain amount from the Company *for those works, the consent of the Company's agent must be assumed, otherwise the contractor would not be justified in the charge which he makes. That is an allegation upon the face of the bill, which the defendants demurring are bound to admit. To tell the plaintiffs, that, if these facts be true, they are not entitled to come here, is to tell them that they must give up the 5*l.* per cent., and give up the plant, which is theirs unless that ground of forfeiture insisted on by the defendants is made out. They say "Protect this property; we have stated such a case on the face of this bill as entitles us to the protection of this property, which is ours, until, at least, the matters are investigated which are put in issue by this bill." If these facts are proved as they are alleged,—if it is proved, that, instead of Mr. Fowler exercising a proper discretion as between the Company and the contractors, he lends himself to the Company, and withholds certificates, in order to involve the plaintiffs in difficulty and distress,—if he has improperly called on them to do works which, owing to the previous directions, they had been relieved from doing as to time,—if he has done all this for the purpose of depriving the plaintiffs of the right which they had, under the contract, for the work they have done, then, beyond all doubt, the Court will protect them against the loss of that property, which is threatened against them by the notice which has been given; and that is the only question to be considered, viz. whether all the facts, put together as they stand

upon the bill, do not entitle the plaintiffs to the interposition of this Court. I am confining it to this particular point merely for the injunction to protect the property the defendants have seized, or have threatened to seize. It is clear the plaintiffs would be entitled to the interposition of this Court for the purpose of protecting that property.

Some allusion was made to some case before me at the *Rolls. I have no recollection of it: but this I know, that this Court does exercise a very wholesome jurisdiction in preventing the violation of negative covenants; and I do not understand how it can be matter of novelty in this Court, that this Court will interpose, by injunction, to prevent a party from violating a negative covenant. Take the case of landlord and tenant. How and why does the Court interpose to prevent a tenant doing that which he has contracted not to do? Only because he has contracted not to do it, and the Court interposes for the purpose of preventing a violation of the covenant. The party may ultimately have his remedy at law. However, on the present occasion, here is an allegation of fraud, which is quite ample to enable the parties to bring the case within the jurisdiction of this Court. Without going more into the case, it appears to me, that the fact being confined simply to the protection of that property, the forfeiture of which is sought to be enforced by the notice given, and, according to the allegations of the bill, fraudulently attempted to be appropriated by the Company and taken from the plaintiffs, there is quite enough in this case to give the Court jurisdiction upon a part at least of the relief prayed, which is all that is necessary for the purpose of a demurrer.

The appeal will be dismissed with costs.

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EVANS v. DAVIES.

(7 Hare, 498—502.)

Construction of the word "children" as under the special words of a will, describing both legitimate and illegitimate children.

A testator bequeathed legacies to his children, M., S., J., W., and N., appointing his wife their guardian, and directing the application of the interest for their maintenance. He then directed that the remainder of his personal estate, and the residue of the proceeds of certain real estates, should be divided between all his children of his first and second marriages. The testator then charged other parts of his real estates with certain annual payments, and directed that the remainder of the rents and profits should be divided among all his said children. The testator then directed, that, in case one or more of the children by his second wife should die without issue under twenty-one, their shares and legacies should go between his second wife and such of his children by her as should be living, and he

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gave the residue of his estate to all and every of his children: Held, that the said S., who was a child by the second wife before marriage, was within the description of "children" contained in the will, and entitled to share with the legitimate children of the testator in the residuary gifts.

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ROBERT MORGAN, by his will, dated in 1840, after devising his real estate to trustees, as to a part thereof, for sale, and bequeathing his personal estate to the same trustees, whom he appointed his executors, and directing that they should stand possessed of the trust-monies, in the first place for the payment of his debts and funeral and testamentary expenses, proceeded as follows: "In the second place, to pay the sum of 1,000*l.* to each of my children Martha, Sarah, Joseph, and William, and the sum of 700*l.* to my son Noah; and in the third place, to divide the remainder, if any, equally between all my children by my first and second marriage, share and share alike." The testator then directed that the said sums of 1,000*l.* a piece should be paid to his said children, Martha, Sarah, Joseph, and William, on their respectively attaining the age of twenty-one years or being married by consent of his said trustees *and his wife, whom he appointed their guardians during their minority; and that, in the meantime, the principal should be invested, and the interest applied towards their maintenance and education. The testator then declared the trusts of the residue of his real estate, after certain payments were made thereout (except an estate called Brynyffynon) to be as follows: "To divide the remainder of the said rents and profits yearly and every year between all my said children, share and share alike, as tenants in common." The testator then declared, that, in case his son Noah or daughter Martha should die without leaving issue, then the legacy and share of the one so dying should go to the other of them; but, in case both of them should die without leaving issue, then their said legacies and shares should go to his children by his said second wife only, share and share alike. The testator then proceeded: "In case any one or more of my children by my said second wife should die without leaving issue before he or she attain the age of twenty-one years, the share or interest of each one or more in my last-mentioned real and personal estate, together with the hereinbefore mentioned legacies bequeathed to them respectively, to go between my said second wife and such of my children by her as shall be living, share and share alike, to their and each of their executors, administrators, or assigns; but, in case all my children by my said second wife should die without leaving issue before they respectively attain the age of twenty-one years, then their respective shares and interests in my said real

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and personal estate to go to my said second wife, if she should survive them, and to her executors, administrators, and assigns, for ever; but, in case of her decease, such shares and interests to go to my children by my first wife, or such of them as shall be living, share and share alike; and, in case none of my children by my said first wife shall be then living, then such shares and interests to go to their issue lawfully *begotten, share and share alike; and, in default of any such issue, to the persons entitled thereto as next of kin. I hereby further direct and declare, that, on the decease of my said second wife, the annuity bequeathed to her under this my will shall go to such of my children as shall be living at the time of her death, share and share alike." The testator then devised the Brynyffynon estate to his trustees, upon trust to permit his wife, during her life, and also his children respectively who should be unmarried, until the youngest of his said children should attain his or her age of twenty-one years or be married, to occupy the same, they paying a certain rent. And, subject to such occupation, the testator directed that the rents and profits thereof should be divided amongst his children in the same manner as he had given the rents and profits of the residue of his real estate. The testator then gave and devised all the residue of his estate to his trustees, upon trust to pay and apply the same unto and amongst all and every of his children, share and share alike.

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It appeared by the Master's report, that Noah and Martha, and a married daughter named Mary, were children of the testator by his first wife, and that Sarah, Joseph, Robert, and William were children by his second wife, but that Sarah was born before marriage.

The question was, whether Sarah could take any interest in the property devised and bequeathed by the testator to his children generally.

Mr. Kenyon Parker and *Mr. Daniel*, for the trustees.

The *Solicitor-General*, *Mr. Sandys*, and *Mr. C. M. Roupell*, for the infant defendants, (other than Sarah,) contended, that the word "children" must be construed *to mean legitimate children exclusively: *Wilkinson v. Adam* (1), *Fraser v. Pigott* (2), *Bagley v. Mollard* (3), *Dover v. Alexander* (4).

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(1) 12 R. R. 255 (1 V. & B. 422). 581).

(2) 34 R. R. 290 (Younge, 354).

(4) 62 R. R. 111 (2 Hare, 275).

(3) 32 R. R. 281 (1 Russ. & My.

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Mr. Temple and Mr. Milne appeared for other parties .

Mr. Selwyn, for the defendant Sarah :

The testator has upon his will defined the meaning which he attached to the word "children," by describing Sarah as one of them. There is no absolute rule that legitimate and illegitimate children may not take under the same description, if it be sufficiently plain that such is the meaning of the testator. The rule is, that, in the primary sense of the word, legitimate children only are comprehended; but if such a restriction be inconsistent with the general disposition of the will, the more enlarged meaning may be adopted. The only consistent interpretation of the language in this case would include Sarah: *Beachcroft v. Beachcroft* (1), *Gill v. Shelley* (2), *Meredith v. Farr* (3).

The case of *James v. Smith* (4), and 2 Jarman's Tr. Wills, p. 144, were also cited.

THE VICE-CHANCELLOR :

There is no doubt as to the general rule, that, if the word "children" be so used by the testator that it can be possibly understood to mean legitimate children only, it will not be extended to others. If, however, the will *plainly refers to given individuals, and it be clear that they are described by the word "children," the Court is not precluded by any of the received rules of law from giving effect to the intentions of the testator. There cannot be any doubt in this case of the testator's intention to include Sarah amongst the children to whom he has given the residue of his property. It appears to me, that, in order to prevent Sarah from taking, I must give to the word "children" in this will a meaning contrary to the language of the testator.

ASHHURST v. MILL.

(7 Hare, 502—516; S. C. 18 L. J. Ch. 129; affd. 18 L. J. Ch. 133; 12 Jur. 1035.)

A sum of money was charged upon an estate as portions for younger children, according to the appointment of the parents, to take effect after their deaths; and the parents, in contemplation of the marriage of their daughter, and of a settlement which her intended husband proposed to make, appointed 5,000*l.*, part of the sum so charged, to the daughter, in case the marriage should take effect.

By a settlement of the same date, a jointure was secured to the daughter

(1) 16*R. B.* 242 (1 Madd. 430). (3) 60 *B. R.* 255 (2 *Y. & C. C. C.*

(2) 34 *B. R.* 106 (2 *Russ. & My.* 525).

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(4) 65 *B. R.* 562 (14-*Sim.* 214, 216).

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by the husband. The marriage took place, and some years afterwards, the father being then dead, an arrangement was made for the sale of the estate, and for the investment in the funds of the sum necessary to provide for the portions. The money was accordingly raised, and invested in the names, among others, of the daughter and her husband, and a declaration executed, in which the trusts of the stock purchased with the 5,000*l.* was declared to be (subject to the life-interest of the mother) for the daughter absolutely. After the death of the father and mother and the husband, the COURT, at the suit of the representative of the husband, rectified the declaration of trust by declaring the 5,000*l.* to be the property of the husband, inasmuch as it did not appear that the husband intended to part with his interest in the fund, or do more than approve of the change of security; the declaration of trust omitting any recital of the settlement on the marriage, and it appearing from the letters which had passed between the solicitors of the parties, when the declaration was made, that neither of the solicitors was aware of that settlement, or of its effect as to the portion of the daughter.

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Variation of the effect of a deed, made for the purpose of carrying into effect a family arrangement, where it contained a declaration of right inconsistent with the actual rights of the parties, and there was no evidence that the inconsistency was known to or contemplated by the parties or their solicitors, or that their actual rights were intended to be altered.

A sum of 10,000*l.* was, by a settlement of July, 1782, charged upon certain lands, as portions for the younger children of Sir John Morshead and Dame Elizabeth his wife, as the father and mother should by deed appoint, and subject to life interests in the father and mother; a term of 1,500 years in the lands was created to raise such sum.

By a deed of appointment, of the 1st of January, 1800, *between Sir John Morshead and Dame Elizabeth his wife of the first part, Selina their daughter of the second part, and Sir Charles Mill of the third part, reciting the settlement of 1782, an intended marriage between Sir Charles Mill and Selina, and that, in prospect thereof, Sir John and Lady Morshead had agreed to appoint 5,000*l.*, part of the 10,000*l.*, for the portion of Selina, Sir John and Lady Morshead in pursuance of their power, and in consideration of the intended marriage, and of the settlement which Sir Charles Mill made upon the said Selina, thereby appointed, that, in case the marriage should take effect, the said 5,000*l.* should, after their own deaths, be raised and paid to Selina.

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By the settlement on such marriage, which was dated also the 1st of January, 1800, Sir Charles Mill, in consideration of the marriage, and of the said sum of 5,000*l.*, the portion of Selina appointed by the other deed, granted to Selina and her assigns for her life, in case the marriage took effect and she should survive him, a rent-charge of 500*l.* a year. After the marriage, in March, 1804, Sir Charles Mill having in right of his wife received a legacy of

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about 2,500*l.*, granted to her a further rent-charge of 500*l.* a year for her life, if she should survive him.

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Sir John and Lady Morshead had three children, Frederick, John, and Selina. Sir John Morshead died in 1813, leaving Lady Morshead and the three children surviving. Upon his death, the lands comprised in the term of 1,500 years became vested in Sir Frederick Morshead, his eldest son, for an estate of inheritance, subject to that term. Subsequently, by an agreement dated in May, 1816, Lady Morshead and Sir Frederick agreed that the lands should be sold, and that, out of the proceeds of the sale, the 10,000*l.* should be invested in the names of trustees for Lady Morshead for life, and, at *her death, for the parties entitled thereto. The lands were accordingly sold, and the 10,000*l.* was paid to Mr. Hayes, of the firm of Messrs. Budd and Hayes, the solicitors of Sir Frederick and Lady Morshead, and was invested in 9,539*l.* 4*s.* 10*d.* Navy 5*l.* per cent. Stock, in the names of Sir Charles and Lady Mill, John Morshead, and T. P. Hayes.

The question in the cause arose upon an indenture, dated the 28th of August, 1819, being a declaration of trust of the 9,539*l.* 4*s.* 10*d.* stock.

This deed was made between Dame Elizabeth Morshead of the first part, Sir Charles Mill and Selina his wife of the second part, John Morshead of the third part, T. P. Hayes of the fourth part, Sir Frederick Morshead of the fifth part, and Edward Morshead and T. H. Budd of the sixth part. It recited the settlement of 1782, the appointment of January, 1800, a subsequent appointment of the other 5,000*l.* to John Morshead, the death of Sir John Morshead, the agreement of May, 1816; that administration to the last survivor of the trustees of the term of 1,500 years, limited to that term, had been granted to T. P. Hayes; that several parts of the estates had been sold, and the 10,000*l.* paid to T. P. Hayes; that T. P. Hayes had, at the request and by the direction of Dame Elizabeth Morshead, Sir Charles Mill, and Selina his wife, and John Morshead, invested the same in 9,539*l.* 4*s.* 10*d.* Navy 5*l.* per cent. Annuities; and it proceeded as follows:

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"It is hereby witnessed, declared, and agreed, by and between all the parties hereto, and particularly the said Dame Elizabeth Morshead, Sir Charles Mill, and Dame Selina his wife, and John Morshead, do hereby severally agree, declare, and direct, that they, the said Sir Charles *Mill and Dame Selina his wife, John Morshead, and T. P. Hayes, and the survivors or survivor of them, and the

executors, administrators, and assigns of such survivor, shall stand and be possessed of and interested in the said sum of 9,539*l.* 4*s.* 10*d.* Navy 5*l.* per cent. Annuities, so purchased with the sum of 10,000*l.* sterling as aforesaid, and now standing in their names in the books &c., upon the trusts hereinafter mentioned, expressed, and declared, of and concerning the same; that is to say, upon trust to pay to or permit and suffer the said Dame Elizabeth Morshead or her assigns to receive and take the interests, dividends, and yearly proceeds of the said sum of 9,539*l.* 4*s.* 10*d.* Navy 5*l.* per cent. Annuities during her life, for her own use and benefit, and after her decease, in trust to assign and transfer one equal half part of the said sum of 9,539*l.* 4*s.* 10*d.* Navy 5*l.* per cent. Annuities, to the said Dame Selina Mill, her executors, administrators, or assigns, to and for her or their own absolute use and benefit; and to assign and transfer the other moiety thereof to the said John Morshead, his executors, administrators, or assigns, to and for his or their absolute use and benefit."

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The dividends on the fund were paid to Lady Morshead during her life. Sir Charles Mill died in 1835, and his widow Selina afterwards married Mr. Ashhurst. Lady Morshead died in 1845.

Soon after the death of Lady Morshead, it became a subject of dispute whether Mrs. Ashhurst was entitled to half of the 9,539*l.* 4*s.* 10*d.* stock, in respect of the 5,000*l.* appointed to her by the deed of January, 1800; or whether such half of the fund was part of Sir Charles Mill's estate.

The original bill was filed in November, 1845, by Mr. Ashhurst and Selina his wife, against the trustees *of the fund and the personal representative of Sir Charles Mill, claiming the moiety of the 9,539*l.* 4*s.* 10*d.* stock, under the deed of the 28th of August, 1819. Sir J. B. Mill, the personal representative of Sir Charles Mill, by his answer insisted that the declaration in the deed of August, 1819, was made by mistake. Upon the hearing of the cause, on the 15th of March, 1847, the Court, not entertaining any doubt, that, upon the construction of the deed of the 28th of August, 1819, the plaintiff Selina Ashhurst was entitled to the moiety of the stock, held that the effect of the deed could not be avoided by way of defence, on the ground alleged; and that, in order to determine the rights of the parties, treating the declaration contained in the deed of the 28th of August, 1819, as the result of a mistake, a suit must be instituted to impeach the deed. The Court ordered the original cause to stand over, with liberty to the parties to file a

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cross bill. In pursuance of the leave thus given, the second suit was filed in April, 1847, by Sir J. B. Mill, against Mrs. Ashhurst (her husband being dead) and the trustees, alleging that the deed of August, 1819, was only intended by Sir Charles and Lady Mill, and the other parties thereto, to operate as a substitution of the stock for the charge on the land, and not to have any further effect or operation; and it prayed a declaration that a moiety of the stock was a part of the personal estate of Sir Charles Mill, and that, if necessary, the deed of the 28th of August, 1819, might be rectified by expunging the declaration of trust therein contained of a moiety of the stock in favour of the defendant Selina Ashhurst, and by inserting, in lieu thereof, a declaration that, after the decease of the said Dame Elizabeth Morshead, the said moiety of the stock should be held in trust for the person or persons who, if the said estates had not been sold, would have been entitled to the moiety appointed to the defendant Selina Ashhurst of the *sum of 10,000*l.* charged thereon, or in such other manner as the Court should think fit.

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The defendant Mrs. Ashhurst, by her answer, said, that she was satisfied, from her knowledge of the business-like habits and character of Sir Charles Mill, that he never signed any deed relating to his affairs, without previously knowing its purport; that their marriage settlement, of January, 1800, remained in Sir Charles Mill's possession until the year 1824, when he delivered the same to her (the defendant), together with the appointment of the same date, and, at the same time, desired her to keep the same, as they would be of use to her; that she was ignorant of the intentions of Sir Charles Mill and the other parties to the deed of August, 1819; however, she believed it was the deliberate intention of Sir Charles Mill that she (the defendant) should have the 5,000*l.*, or the stock which represented the same; and she was advised that he had sufficiently indicated such intention by executing the declaration of trust, and by subsequently delivering to her the deed of 1800, accompanied with the expressions referred to.

It appeared that Messrs. Budd and Hayes, the solicitors of the Morshead family, by whom the sale and transactions of 1819 were conducted on their behalf, were ignorant of the contents or effect of the settlement of January, 1800. Mr. Daman, a solicitor of Romsey, acted in the transaction for Sir Charles and Lady Mill. All that appeared to have taken place in the course of the communications between the parties, having direct reference to their

interests in the 5,000*l.*, arose upon a question suggested by a conveyancer who examined the title to the estate on behalf of one of the purchasers. He had observed, "If the 5,000*l.* appointed to Lady Mill was settled, the settlement should be recited, and the *trustees made parties." Mr. Hayes, on the 1st of July, 1819, wrote to Mr. Daman with reference to this inquiry, and requested an answer as soon as possible. On the 17th of July Mr. Daman thus replied to Mr. Hayes:

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"I waited on Sir Charles and Lady Mill myself this day, and they approve of your proposed arrangement for investing the money in the funds; and they are both quite satisfied that the 5,000*l.* in question has never been the subject of any settlement whatever. Sir Charles Mill settled a jointure on his wife previously to their marriage, which he afterwards increased; and Lady Mill in particular is quite sure that it was understood that her portion was not to be, and that it never was, settled in any way. As I did not act for Sir Charles Mill at the time of his marriage, I was not before aware of the above circumstances."

Some other parts of the correspondence are adverted to in the judgment. The draft of the declaration of trust of August, 1819, was prepared by Messrs. Budd and Hayes, and approved by Mr. Daman on behalf of Sir Charles and Lady Mill. Mr. Daman had since died. A letter written by him to Messrs. Budd and Hayes, in January, 1820, stated that he had written a full explanation of the business to Sir Charles Mill, and sent his principal clerk to obtain the execution of the deed and the power of attorney, to enable Lady Morshead to receive the dividends. It appeared also that he had made and retained a copy of the declaration of trust for Sir Charles and Lady Mill.

The defendant examined Mr. Cocks, the banker of Sir Charles Mill, who deposed to his capacity for and accuracy in business, and to the improbability, in his opinion, *that Sir Charles Mill would execute any deed without knowing its effect.

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The two causes were now heard together.

The *Solicitor-General* and Mr. Lloyd, for Mrs. Ashhurst, insisted upon the plain legal effect of the deed of August, 1819, and contended that there was no evidence of any mistake. [They cited *Marquis of Breadalbane v. Marquis of Chandos* (1), and other authorities.] The deed was, moreover, a family arrangement,

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which, independent of the consideration of the strict rights of the parties, the Court would go far to support: *Stockley v. Stockley* (1).

Mr. Rolt and Mr. Prior, for the representative of Sir Charles Mill, denied that the cases of rectification of instruments, on the ground of mistake, were confined to those where the mistake was common to all parties. If any party to an instrument had parted with an interest which he was not bound, and had not intended, to convey, or if an interest in property, of which a party had the dominion, had been vested in others in a manner contrary to his intentions, the Court would relieve against the error. In this case, there was in fact no doubt that the right of Sir Charles Mill to the fund in question had escaped the attention of the parties; and this was in truth not denied by the answer of Mrs. Ashhurst. [They cited *Duke of Bedford v. Marquis of Abercorn* (2), *Marquis of Exeter v. Marchioness of Exeter* (3).]

Mr. Giffard, for the trustees.

[511] THE VICE-CHANCELLOR :

The facts necessary to be stated, in order to show upon what the question depends, are few and simple. In April, 1819, as soon as the sale had been effected, a correspondence was opened between Mr. Hayes, who, with his partner Mr. Budd, were solicitors for the Morshead family, on the one part, and Sir Charles Mill on the other part, with a view to the completion of the conveyances and the other arrangements consequent upon the sale. Sir Charles Mill put the affair into the hands of his solicitor, Mr. Daman, between whom, as solicitor for Sir Charles, and Messrs. Budd and Hayes, or Mr. Hayes on the part of the Morshead family, the correspondence continued down to the end of the year 1819, about which time the deed dated in August, 1819, was executed, that deed having been approved by Mr. Daman on the part of Sir Charles Mill. Mr. Daman is dead, and no material evidence, except that which is furnished by the correspondence and the deed itself, is before me. Mrs. Ashhurst does not by her answer suggest that Sir Charles Mill ever communicated to her any intention to alter the title to the moiety of the 10,000*l.*, which he acquired under the deed of 1819, or to give her any beneficial interest in it.

The first observation that occurs is, that the recitals in the deed

(1) 12 R. R. 184 (1 V. & B. 23).

(3) 45 R. R. 267 (3 My. & Cr. 321).

(2) 43 R. R. 200 (1 My. & Cr. 312).

of August, 1819, do not mention the deed of the 1st of January, 1800, by which Sir Charles Mill became entitled to the moiety of the 10,000*l.* It contains all the recitals material to show the true state of the title, except that. It contains a recital of the agreement between Lady Morshead and Sir Frederick Morshead, that, at the death of Lady Morshead, the 10,000*l.* should go to the persons entitled thereto; and then follows the declaration in favour of Lady Mill and John Morshead, which is in accordance with the *title shown by the recitals, but is not in accordance with the true state of the title as affected by the settlement of the 1st of January, 1800. Now, if there were no intention on the part of Sir Charles Mill to alter the title to the moiety of the 10,000*l.* by the deed of August, 1819, and the trust in favour of Lady Mill was declared upon the supposition that it was hers, that is, if the settlement of January, 1800, was merely overlooked by mistake, it can scarcely, I think, be argued, that Sir Charles Mill, if living, would not have been entitled to be relieved against so plain a mistake. Even in the cases of compromise of disputed rights, arrangements will be set aside, where it can be satisfactorily proved that the parties acted under a mistake. On this point the *dictum* of Lord ELDON, in *Stockley v. Stockley* (1), and the case of *Harvey v. Cooke* (2), are authorities. If in this case the real purpose of the deed of August, 1819, were to change a security and nothing more, an erroneous declaration of right, proceeding from a mistake such as I now suppose, could not be permitted to affect the actual right. There has been no delay affecting the title to relief. Lady Morshead died in 1845, and nothing occurred after August, 1819, to call attention to the subject, until her death.

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Then, is the alleged mistake made out? It is admitted that the arrangement of 1819 arose solely out of the agreement for the sale of the estate between Lady Morshead and her son; and the letter Mr. Hayes wrote to Sir Charles Mill, in April, 1819, opening the correspondence on the subject, is in accordance with that fact; and it is deserving of notice, that Mr. Hayes in that letter writes about the 10,000*l.*, as if it were unaffected *by any dealings since 1782. By Mr. Daman's letter of the 9th of April, 1819, in answer to that of Mr. Hayes, from which it appears that Sir Charles Mill had handed the business over to him, Mr. Daman treats the transaction as one in which he is simply to see that the deeds prepared, or to be prepared, by Mr. Hayes on the part of the Morshead family, are

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(1) 12 R. R. 184 (1 V. & B. 30).

(2) 4 Russ 34.

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in accordance with the rights of Sir Charles Mill. In the next letter, dated the 9th of May, Mr. Hayes, writing to Mr. Daman, says, "Out of the purchase-moneys 10,000*l.* is to be invested to answer the portions of Lady Mill and Mr. Morshead, at Lady Morshead's death;" and he adds, "You will get Sir Charles and Lady Mill to name a person in whose name the fund shall be invested." In this letter again, as in the former, Mr. Hayes treats the money as belonging to Lady Mill. The next letter is dated the 30th of June, 1819, from Hayes to Daman, and the same mistake appears to be continued. Mr. Hayes says, "I think the best names for the investment will be Sir Charles Mill, Lady Mill, Mr. John Morshead, and myself. I beg you will submit this to Sir Charles and Lady Mill, with my respects, and acquaint them that Lady Morshead and Mr. John Morshead will approve of the plan, if they do." In a postscript he says, "A declaration after the investment is completed must be signed by the parties in whose name it is made." The parties here suggested include Lady Mill, who had no interest in the fund. Nothing can be more plain than that, up to this time, the correspondence had proceeded upon a mistake as to Lady Mill's interest in the trust-moneys. The next letter, dated the 1st of July, 1819, from Hayes to Daman, puts this beyond all dispute. He states the inquiry which had been made by one of the purchasers, and desires an answer as soon as possible; and then follows a letter from Daman to Hayes, of the 17th of July, in which, after apologising for the delay, he says, "I waited on Sir Charles and *Lady Mill myself this day, and they approve of your proposed arrangement for investing the money in the funds, and they are both quite satisfied that the 5,000*l.* in question has never been the subject of any settlement whatever. Sir Charles Mill settled a jointure on his wife previous to their marriage, which he afterwards increased; and Lady Mill, in particular, is quite sure that it was understood that her portion was not to be, and that it never was, settled in any way. As I did not act for Sir Charles Mill at the time of his marriage, I was not before aware of the above circumstances."

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It is plain from the expression in that letter, that the parties spoke from recollection (which in fact was perfectly accurate), that the 5,000*l.* was not the subject of the marriage settlement. But there is nothing, down to this point, favourable to the supposition that the attention of Sir Charles Mill or Daman was called to the settlement of the 1st of January, 1800, except the reference in

Hayes's letter of the 1st of July, 1819, to the appointment of 5,000*l.* to Lady Mill; and there is no ground for supposing that Mr. Daman knew of any reason for the use of the name of Lady Mill as one of the trustees of the fund.

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In this state of things, the declaration of trust prepared by Hayes was sent to Daman, and it appears to have been approved by him on the part of Sir Charles before the 18th of December, 1819; for on that day Hayes sends the engrossment, and says, "You have the draft of the deed in case you like to examine the engrossment with it." Nothing afterwards occurred in the correspondence requiring notice, except that Daman mentions that he had requested Lady Mill's signature. From what took place it is impossible to infer that anything was contemplated beyond a transfer of security.

Then, as to the deed of August, 1819. It was prepared by Mr. Hayes, and follows exactly the course which the original mistake would lead one to expect. It recites documents which show a title in Lady Mill. The recital of the intention, that, at the death of Lady Morshead, the money is to be paid "to the parties entitled thereto," must in construction mean entitled thereto according to the preceding recitals; and the subsequent declaration following upon it is (in effect), as matter of construction, only a declaration that such are the rights of the parties. Upon this alone I think the same conclusion follows.

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Then, what is the theory which is to explain this? It is, that Sir Charles Mill privately instructed Daman that Lady Mill was to have the 5,000*l.* I confess I cannot admit that. The theory supposes that the real state of the title was present to the mind of Sir Charles Mill. If so, why did he conceal the state of the title, when the result of his supposed intention to benefit Lady Mill is stated upon the face of the deed. The hypothesis is too extreme to be admitted; and when to this is added Mr. Cocks' evidence, the theory is still more inadmissible. The evidence of Mr. Cocks is that Sir Charles Mill was a man of business, and not likely to execute a deed which he did not thoroughly understand, or without knowing what his rights were. This cannot be said to be consistent with the fact that Sir Charles Mill should have executed a deed intending thereby to confer a benefit upon his wife, such deed not setting out the state of the title to the property to which it related, or in any manner showing that he was not merely transferring the property for the purpose of security, but was in fact parting with it.

ASHHURST I cannot see that the statement, that the deed of settlement was
 v. actually delivered by Sir Charles Mill to Lady *Mill at all affects
 MILL. the question of the intention of Sir Charles Mill in executing the
 [*516] declaration of trust.

The decree will direct the dismissal of the first bill, and the transfer of the fund in the second suit. The case is not one in which costs should be given.

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 Dec. 12.

The case now came on, by way of appeal, before the Lord Chancellor.

[18 L. J. Ch.
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The *Solicitor-General* and *Mr. Lloyd*, for Mr. and Mrs. Ashurst (1), contended that the deed of trust, duly and deliberately executed, must be presumed to express the real intentions of the parties; that the judgment of the Court below had failed in throwing upon Mrs. Ashurst to prove affirmatively what Sir C. Mill intended, and that the *onus* of that proof ought to have been cast upon the opposite party.

Mr. Rolt and *Mr. J. V. Prior*, in support of the judgment below.

Mr. Giffard, for the trustees.

Dec. 14.

THE LORD CHANCELLOR:

As I understand it, the deed of January, 1800, was a direct appointment in favour of the daughter, and, by the marriage settlement, that 5,000*l.* was assigned to the husband. It no doubt at first sight appears very extraordinary and very difficult to understand how this transaction took place, but upon minutely examining the instrument itself and coupling it with the correspondence, I think the whole mystery is unravelled, and the transaction is explained so as to relieve it from any possibility of doubt.

The question is as to the sum of 5,000*l.* charged upon certain property over which the father and mother of the intended wife had a power of appointment; and they being minded to appoint 5,000*l.* in favour of the daughter in consequence of her intended marriage, a regular appointment of 5,000*l.* was made to her. In her marriage settlement, which was a part of the same transaction, though separate in point of instrument, in consideration of certain provisions made for her by the intended husband, that 5,000*l.* is assigned to the husband absolutely. Now, that interest in the

(1) "Ashurst" occurs throughout in the Law Journal and Jurist reports.

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5,000*l.* was reversionary expectant on the death of the father and mother: it was a sum therefore in which the husband, if nothing had been done to give him the property, would have had certainly a contingent right and interest; because, if it fell into possession during the coverture, the husband would have been entitled to it *jure mariti*, if nothing had been done to bar his marital rights. Upon the other hand, if the wife had survived him she would have been entitled to this chose in action if not reduced into possession during the coverture. The effect of the settlement, therefore, was to deprive her of that chance of survivorship. If she died first, the settlement would have given him no benefit, for he would have taken it *jure mariti*; but in the event of the wife surviving, it protected him against that chance, and gave him at all events a direct and immediate benefit in the reversionary interest. Then, in the year 1819, there being an arrangement in progress, not touching at all the interest in the 5,000*l.*, but touching the property on which it was charged, the instrument of 1819 recites the transaction up to the execution of the power in favour of the daughter, the intended wife, and there it leaves it. Then it goes on, as a necessary consequence of a title so recited, to show the title to be in her, and being in her, if it had not been affected by any transaction on her marriage, it would be her expectant reversionary interest to be disposed of according to the event of her surviving or not surviving. In the one case, it would have become the property of the wife, and in the other the property of the husband *jure mariti*; and therefore most consistently with that view of the state of the title, the conveyancer proposes to make it payable to her, because in that view of the state of the title it was hers, and there was nothing upon the face of the deed showing the property, so vested in *her by this appointment to have been affected by any subsequent transaction. The effect of that deed would be, to do what the law would have done without it. The property belonged to her contingently during the life of the father and mother: and it was therefore uncertain and depending upon the survivorship, whether the husband would have been entitled to it or the wife; therefore it was made payable to the wife. There is nothing inconsistent upon the face of that instrument, looking at the mode in which the title is recited. Then it is said, that that of itself is rather extraordinary upon the face of the instrument, because the husband and wife being parties to the instrument of 1819, and they being also parties to the marriage settlement, it was a very extraordinary thing, that in dealing with

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this property they should omit to take notice of the operation of this settlement as affecting the 5,000*l.* The attention of the parties is drawn to the settlement; but no notice is taken of the instrument as operating on the interest of the 5,000*l.*; but when you look at the letters, the whole mystery is unravelled; and it is perfectly plain how that took place. The conveyancer in preparing the deed, seeing that 5,000*l.* had been appointed in favour of the daughter, very naturally asks the question, "whether the 5,000*l.* is settled? for if it is settled, then the trustees of the settlement ought to be parties." That is the inquiry he makes. It all turns on the meaning which the parties attached to the word "settled." The conveyancer's object was to know whether any of the parties to the settlement became necessary parties to the instrument he was preparing. The answer is, they have inquired of the husband and wife, and they both agree that it never was settled, or as the expression is, "the subject of settlement." That is a total misapprehension. In one sense it is true; it was never vested in trustees and made the subject of a provision for the wife and children; but it was acted on by the marriage settlement, and it became one of the subjects of the marriage settlement; and the effect of the marriage settlement was to give it to the husband, and to deprive the wife of her chance of the survivorship, which she would otherwise have had. And then, with that information which was understood to mean that the settlement did not touch it, but left it where it was, the conveyancer most properly assumed those facts to be the case, and left the property as it would have been if not touched by the settlement, the property of the wife, and therefore uncertain to whom it would ultimately belong. Now, then, if this property, which was clearly the property of the wife in the first instance, has clearly become the property of the husband, what has happened to change the interest in that property? Not this mistaken recital of the state of the title. If you can find anywhere an intention on the part of the husband to give it to the wife, no doubt, whether it is in one sort of instrument or another, it will operate for that purpose. The husband now claims it, and the wife must show some intention on his part to bestow that 5,000*l.*, which was his by the settlement, on the wife. But not only is there no evidence of that, but the deed proves to demonstration, in my opinion, that no such intention existed.

What must you suppose to be the case? This property being the property of the husband under the marriage settlement, he

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being minded to bestow it upon his wife, adopts this extraordinary course; he not only conceals that he is the party to take, which it is obvious he did from the instrument itself, but by the instrument he conceals the fact of its ever having been his: he is a party who, without speaking of his liberality or the benefit he intended to give, suppresses the fact that he ever had any interest, and represents it as belonging to the party on whom he intended to bestow it. That is so entirely out of all reason that it cannot be supposed to have entered into the mind of the party. The deed recites that it is hers. How can it be supposed that property belonging to another party was intended to be given by this instrument? It is quite clear that there was a misapprehension, and that the inquiry was answered in the way I have explained, the husband and wife not having their attention directed to the fact, and the professional men who were employed acting upon the answer to their question, as I have stated, considered it never had ceased to be the property of the wife, and *it remained in point of interest precisely as it did on the execution of the appointment.

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Well, if there is no evidence of an intention to give, you cannot take it from the party who is proved to be entitled to it, without showing an intention to part with it, and it is not by a recital or a statement, or acting upon a state of title which did not exist, that the interest of a party can be changed. In point of fact the deed is perfectly innocent for that purpose. The property was a chose in action belonging to the wife. She, by the marriage settlement, being equitably benefited by that settlement, and having that chose in action, parts with her property and gives it to her intended husband. She remains ostensibly under the appointment the party to receive, and the deed treats her as the party to receive. Does that take away all effect of the marriage settlement by which her beneficial interest is taken from her, and given to another? If she takes under this instrument, and if there had been no such instrument, and she survived and actually received the money, (which undoubtedly she would have been entitled to receive, if it had not been for the marriage settlement), can it be doubted that the fund would have been subject to the trusts of the marriage settlement? She had previously parted with the interest in that fund, which ultimately comes to herself. The instrument itself is operative for the purposes for which it was intended; but it is an inaccurate dealing with the fund in this state of the title, and it cannot affect the interest of the parties according to the uses as they were

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created under the marriage settlement; and the result is, that the instrument stands for all the purposes for which it was intended; and notwithstanding that instrument, the property was the property of the husband, as it had been bestowed upon him by the marriage settlement.

Now, agreeing in the result with the VICE-CHANCELLOR, I have looked at the decree for the purpose of seeing whether the decree carries into effect the settlement in the way in which it strikes me it ought to be carried into effect. I find it does exactly. It does not profess to alter the deed, but merely declares the 5,000*l.* to be the property of the husband. I quite concur in that opinion, and in the mode in which that judgment is carried into effect by the form of the decree, and that it is properly carried into effect. I am clearly of opinion, although it is very difficult to understand how the transaction assumed that shape, that the decree is right in declaring that the 5,000*l.* is the property of the representatives of the husband.

PHILLIPSON *v.* GATTY (1).

(7 Hare, 516—532; S. C. 13 Jur. 318; on app. 2 H. & Tw. 459.)

1848.
July 21, 24,
25, 26.
Nov. 7.

WIGRAM,
V.-C.

On Appeal.
1850.

Jan. 22, 23,
24, 25.

Lord
COTTENHAM,
L.C.

[7 Hare, 516]

A cestui que trust discovering a breach of trust, but not receiving any benefit from it, or conniving in it for any purpose, and not recognising the transaction, is not precluded from complaining of it merely on the ground that he abstained from making any complaint until long after he first knew of it.

Where stock stood invested in trust, for the mother for life, with remainder to her son and daughter and their children, the daughter knew of an application by the son for a loan from the trustees of part of the trust-moneys, upon his personal security, and that the trustees were willing to make the loan, with the consent of her mother, the tenant for life, and that the loan was, in fact, afterwards made. The daughter objected to the loan in her communications with her mother, but did not otherwise oppose it, and had not any communication with the trustees on the subject: Held, that this was not such acquiescence on the part of the daughter to the loan as to preclude her from charging the trustees with the breach of trust, in a suit instituted seven years after the transaction took place.

Held, also, that the daughter was not precluded from so charging the trustees, by the fact that she knew that the mother had (untruly) stated to her son that she (the daughter) had consented to the loan, such statement of the daughter's consent never having been communicated to the trustees, or constituted any part of the sanction or authority under which they acted.

It was not necessary to decide the simple case, whether, if the daughter had permitted the son, in the belief that the daughter assented to it, to obtain the loan from the trustees, they could have availed themselves of any defence to the suit, which the son might have, as against the daughter;

(1) *In re Salmon* (1889) 42 Ch. D. 351, 62 L. T. 270.

for, in this case, the letters of the son to the mother, requesting the loan, and upon which the mother's consent was given, proposed not to affect the daughter's rights as against the trustees.

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An investment by trustees of 2,183*l.*, trust funds, which they were empowered to lend on real security, in a mortgage of house property in a town, occupied for commercial purposes, and valued at 2,800*l.*, a value also, in some measure dependent on the performance of covenants,—held not to be justified.

Where trustees, having power to invest on Government or real security and vary such investment from time to time, sold out stock for the purpose of investing the produce of the stock in a mortgage which they were not justified in taking, it was held that the Court could not treat the sale of the stock as lawful, and the investment as unlawful, so as to satisfy the trust by replacing the money; but that the whole must be treated as one unjustifiable transaction, and that the trustees must replace the stock.

Where trustees lent the trust-moneys to one of the cestuis que trust, upon a contract which constituted a breach of trust, the COURT in a suit by the trustees against all the cestuis que trust, refused, as against the cestui que trust who had obtained the loan, to make a decree for the repayment of the money, contrary to the terms of the contract.

THE defendants, Gatty and Owen, were trustees of a sum of 4,539*l.* 5*s.* 10*d.* 3*l.* per cent. Consols, which they *held upon the trusts of a settlement, and of an appointment made in exercise of a power contained in the settlement. At the time of the transactions which were the subject of these suits, the fund stood upon trust for Eliza Phillipson for her life, and after her decease, for her son Richard Phillipson and her daughter Mary Ann Phillipson, in equal shares; and in the event of either Richard or Mary Ann dying in the lifetime of their mother leaving issue, the share of him or her so dying was to go and be equally divided, if more than one, among his or her child or children in equal shares; but in case of the death of either Richard or Mary Ann, in the lifetime of the mother, without leaving issue, the share of him or her so dying was to go to the survivor.

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The settlement creating the trust empowered the trustees from time to time, with the consent in writing of the husband and Eliza Phillipson the wife, and the survivor of them, to invest, sell out, and reinvest the trust-moneys in the public funds of Great Britain, or upon real security in the same kingdom. Eliza Phillipson had survived her husband.

In 1835, a sum of 2,191*l.* 15*s.* 8*d.* Consols, part of the trust funds, was sold out, for the purpose of raising 2,000*l.* sterling, which was lent upon mortgage to a Mr. Wynne, thereby reducing the trust stock to 2,847*l.* 10*s.* 2*d.* Consols. Wynne's mortgage was afterwards paid off, and the 2,000*l.*, instead of being invested according to the terms of the trust, was lent to Richard Phillipson the son,

PHILLIPSON upon his personal security. This step was taken with the consent
 of Eliza Phillipson, communicated in a letter from her, dated the
 1st of October, 1837, to Gatty and Owen, the trustees (Exhibit X),
 which was in the following words:

[*518] "GENTLEMEN,—I have reconsidered the subject in question since I wrote to you, and I beg to inform you *that I now give my sanction to your advancing my son Mr. Richard Phillipson the sum of 2,000*l.*, now in loan to Mr. W. W. E. Wynne, and to allowing the annual interest to go towards the annual allowance I make him."

The loan to the son was carried into effect by an indenture of the 9th of November, 1837, made between the son and the trustees, reciting the title of the parties to the trust fund, and that Richard Phillipson, having occasion for the loan of 2,000*l.*, had requested the trustees to lend him that sum, which they had agreed to do, out of monies belonging to them on a joint account, upon the same being secured by mortgage of the share of Richard Phillipson in the monies in which he was interested under the settlement; and Richard Phillipson thereby assigned his share of the funds comprised in the settlement to the trustees, with a proviso for a reassignment in case Richard Phillipson should pay interest on the same at 4*l.* per cent. half-yearly, and repay the principal to the trustees within six months after the death of Eliza Phillipson; which Richard Phillipson also thereby covenanted to do.

In March, 1838, the trustees, at the proposal of Richard Phillipson, sold out the 2,347*l.* 10*s.* 2*d.* Consols, and lent the produce of the sale, amounting to 2,183*l.* 3*s.* 8*d.*, to a Mr. Langstaffe, upon mortgage of a freehold dwelling-house, shops, and warehouses in the town of Northampton. Part of this property had been demised by Langstaffe for a term of years, with other property, of which Langstaffe was himself lessee; and by the terms of the demise Langstaffe was bound to keep the demised premises in repair. In 1841 the lessor of the leasehold portion of the premises comprised in Langstaffe's demise, recovered that portion of the property
 [*519] in ejectment *owing to a breach of covenant by Langstaffe, in omitting to repair, and his lessees thereupon determined their tenancy of the freehold portion of the premises comprised in the mortgage, which thenceforward remained unoccupied.

The original bill was filed in March, 1844, by Mary Ann Phillipson the daughter, insisting that the loan of the 2,000*l.* to

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Richard Phillipson was a breach of trust, and that the loan of the remainder of the trust-moneys on the Northampton mortgage had been made upon the security of property of inadequate value; and praying that the trustees might be decreed to replace the entire sum of 4,539*l.* 5*s.* 10*d.* Consols. The trustees thereupon filed their cross bill against Eliza Phillipson, Richard and Mary Ann, charging, that, in the employment of the trust-money, Richard Phillipson had been throughout the agent of his mother and sister, and that all which was complained of in the original suit had been done with the knowledge and sanction of the three; that, if Mary Ann had not previously sanctioned the transactions in question, she knew of them at the time, and had not objected to, but had, on the contrary, acquiesced in them; and that, whatever the rights of any children of Richard or Mary Ann might be, neither Eliza Phillipson nor Richard or Mary Ann were entitled to complain of the state of the trust funds. The trustees also by their answer to the original suit insisted, that the property comprised in the Northampton mortgage had been of adequate value at the time the mortgage was made. The cross bill prayed, that Richard Phillipson might be decreed to repay the trustees the 2,000*l.*, that the advance might be declared to have been made with the consent of Eliza Phillipson, *and that the trustees might be indemnified out of her life interest and the interest of Richard in the trust funds. With regard to the Northampton mortgage, the trustees by their cross bill offered to deal with the security as the Court should direct, and prayed a declaration that they were not liable to make good any loss owing to a deficiency in the security; and that Eliza Phillipson, Richard, and Mary Ann might pay the costs of the cross suit, and the two former the costs of the original suit.

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Evidence was gone into, — first, as to the alleged agency of Richard, — secondly, as to the sanction of or acquiescence in the loan to him by the mother and sister, — and, thirdly, as to the adequacy of the value of the property comprised in the Northampton mortgage, and the alleged concurrence of the cestuis que trust in taking that security.

The Court decided, that the point made by the trustees, of the general agency of Richard, or his general authority to act for his mother and sister, had not been established. The special authority given by Eliza Phillipson for the loan to Richard was not disputed. The privity or acquiescence of Mary Ann was sought to be shown by the fact that she was with her mother when the application of

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her brother for the loan of 2,000*l.* was made,—that the letter of her mother, sanctioning the loan, was read to her before it was sent,—and that the mother, in a letter to Richard, dated the 1st of October, 1837, (Exhibit W), after referring to the reluctance of Mary Ann to assent to the proposal as to the loan, adds, “However, I am happy to inform you, she desires me to say, she will accede to your desire in consenting to my writing to Mr. Gatty to lend it, as you will see on the other side.” The letter concluded, “Will you tear off *the half sheet, and direct it to Mr. Gatty?” This referred to the letter (Exhibit W), which was written on the same sheet. It did not appear that this statement of the mother, as to Mary Ann, had been communicated to the trustees; and the mother, by her evidence in the cause, stated, that the representation as to Mary Ann having acceded to her brother’s desire was untrue, and that the passage in the letter to that effect was written without the consent and against the will of Mary Ann. The letters of Richard Phillipson to his mother, requesting the loan of the 2,000*l.*, stated that the trustees, who were persons of honour and responsibility, would be personally responsible to Mary Ann and to the infant cestuis que trust. The evidence went to show that Mary Ann had objected to the loan of the 2,000*l.* to her brother, but it did not appear that the fact of her objecting to it had been communicated to the trustees.

With respect to the Northampton mortgage, it appeared that the proposal to change the investment from stock to real security had been made by Richard Phillipson in a letter to Mr. Gatty, one of the trustees, dated the 12th of October, 1837, which was as follows: “There is a sum in Consols, 2,347*l.*, the remainder of the sum in trust to you and Owen. This produces my mother nearly 70*l.* a year, but, if sold out at the present price of stock, it would fetch 2,250*l.*, which, at 4*l.* per cent. on mortgage will yield her 90*l.* a year. I therefore propose that you should place it out on a secure mortgage, taking an early opportunity of realising at the high price of stock. I have written to her on the subject, and will try and get a good freehold security in Warwickshire.” The proposal for the Northampton mortgage was afterwards made by Richard Phillipson, and it was accepted at his suggestion. At the time the security was taken, the property was situated *in a very advantageous position for mercantile purposes, and it had been a short time before valued with a view to another mortgage then in

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contemplation, at 2,800*l.* In 1842 the trustees had offered the property for sale, but no more than 1,800*l.* was bid for it. A depreciation in the value had arisen from the unforeseen circumstance of the trade being diverted from Northampton by the subsequent formation of railways passing at a distance from it. A portion of the property had been demised at 90*l.* a year, by a lease, of which upwards of ten years were unexpired; but the continuance of that lease was dependent on the performance of covenants by Langstaffe, and was, after the mortgage, determined by his default, as above stated.

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Mr. Walker and Mr. Giffard, for Mary Ann Phillipson.

The Solicitor-General and Mr. Rasch, for Eliza Phillipson and Richard Phillipson.

Mr. Bethell, Mr. Wood, and Mr. E. F. Smith, for the trustees.

The cases cited, on the title of the *cestuis que trust* to relief, and on the mode of adjusting the relief, in respect of the breach of trust, as between the tenant for life and the party entitled in remainder, who had sanctioned or acquiesced in the breach of trust, and the other parties interested in the trust-moneys, were *Fuller v. Knight* (1), *Brice v. Stokes* (2), *Gregg v. Wells* (3), *Woodyatt v. Gresley* (4), *Munch v. Cockerell* (5), and *Franco v. Franco* (6).

On the question, whether the trustees were justified in making the investment on the Northampton mortgage, *Stickney v. Sewell* (7).

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THE VICE-CHANCELLOR (after stating the facts of the case):

I am of opinion, that there is nothing in the letter X alone which can be read against Mary Ann Phillipson, so as to deprive her of her right to relief against the trustees. The letter emphatically expresses the sanction of Eliza Phillipson, the mother, to the loan, but not that of Mary Ann; and the evidence of the mother is, that Mary Ann, who was with her at Paris when the letter X was written, objected to it. The trustees could not, upon that letter alone, have acted upon the supposition that they had the plaintiff's

(1) 63 R. R. 51 (6 Beav. 205).

(2) 8 R. R. 164 (11 Ves. 319).

(3) 50 R. R. 347 (10 Ad. & El. 90).

(4) 42 R. R. 153 (8 Sim. 180).

(5) 48 R. R. 270 (5 My. & Cr. 178).

(6) 3 R. R. 50 (3 Ves. 75).

(7) 43 R. R. 129 (1 My. & Cr. 8).

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sanction for what they were doing. They cannot, upon letter X alone, successfully contend that they have been led into a breach of trust by anything Mary Ann either said or did, to sanction the loan before it was made. The case of the trustees, therefore, as against her, must depend upon some subsequent acquiescence on her part in a known breach of trust. But, in absence of any authority precedent, I cannot find any evidence of such acquiescence as should deprive her of her right to enforce her claim against the trustees. Had she, indeed, with knowledge of the breach of trust, taken any benefit from it, or recognised the transaction with Richard Phillipson as valid, the case might have been otherwise; but nothing of that sort appears. Her interest in the 2,000*l.* was reversionary, and liable to be determined altogether in favour of Richard Phillipson, by her death without issue in the lifetime of her mother.

[*524] The case, therefore, *in the strongest way of stating it against Mary Ann, is simply that of a cestui que trust discovering a breach of trust, and not complaining the instant she had notice of it. If the evidence, upon a reasonable construction, led to the inference that Mary Ann, having had notice of the breach of trust, had connived at it for the purpose of accommodating Richard Phillipson or consulting his wishes, a different conclusion might have been come to. But the effect of the evidence on my mind is the opposite of this. I think the plaintiff had her own interests, not improperly, in view, and did *bonâ fide* object to the loan in question; and the only observation I consider her open to on this point is, that she appears to have wanted strength of mind to come forward, in the first instance, and oppose herself to her mother and brother. But I cannot hold the trustees thereby discharged from a breach of trust, for which they cannot say they had the sanction of Mary Ann.

The case, however, may be considered as open to other considerations, when viewed with reference to the letter W, from the mother to the son. The son had requested his mother's sanction to the loan of the 2,000*l.*, upon personal security, saying to her that the trustees were willing if she would sanction the act. This, for some time, she had refused to do, on the ground that Mary Ann's interest might be injured by it. But in the letter W she states that Mary Ann had acceded to her brother's desire. According to the evidence of Eliza Phillipson, this statement was untrue, and Mary Ann objected altogether to the loan. The letter, however, was read to her by her mother before it was sent; and, though she objected to

it, she had not, as I have already observed, strength of mind enough openly to oppose herself to the acts of her mother and brother.

Now, if in those circumstances the letter W had been communicated to the trustees by Richard Phillipson, that circumstance, coupled with the fact that Mary Ann Phillipson was informed of its contents, though she did not sanction but objected to the statement therein, that she consented to the loan, might have placed the trustees in a better position against Mary Ann than they now stand in; for they might then have contended, that she had, as in the case put by Lord ELDON in *Evans v. Bicknell* (1), stood by and permitted them to act upon representations made by Richard Phillipson respecting her interests, which she knew to be false. But this was not the case. The trustees do not pretend that they knew of or acted upon the statement in letter W. The letters they rely upon in their answer in the original suit are letter X and the letter of the 12th of October, 1837, from Richard Phillipson to them; and in the cross suit they rely upon the letter X alone, and ask no relief against Mary Ann Phillipson in respect of the 2,000*l.* It is not, therefore, part of the case of the trustees that they acted upon the supposition that Mary Ann sanctioned beforehand what they did.

There is, however, a question yet to be noticed respecting the 2,000*l.*, by which at one time I felt pressed. Admitting that the trustees were not misled by letter W, it in terms justified Richard Phillipson in supposing that Mary Ann consented to the loan, and if, acting under an impression so created with her knowledge, he has made a contract with the trustees, which the letter authorised, that might deprive Mary Ann of a right to complain that Richard had got possession of the money from the trustees; and if she were barred from complaining of that, the trustees might also have a right to contend that she was barred from complaining of their conduct. In other words, they might have had a right to shelter themselves from the consequence of their breach of trust under a case made by Richard Phillipson, although they were ignorant of that case at the time the breach of trust was committed. This is in material points distinguishable from the case I have before considered.

Upon the best consideration, however, I can give the case, I think the trustees cannot so protect themselves. The case, I may observe, is not a case specifically made by the trustees either as defendants

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(1) 5 R. B. 245 (6 Ves. 174).

PHILLIPSON or as plaintiffs. In the cross suit, as I have said, no relief is prayed
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The trustees, it will be remembered, are supposed to have known nothing of letter W. The case supposed is, that the trustees, having acted upon letter X only, have since the transaction discovered the letter W. The case, therefore, must be tried simply and entirely between Mary Ann and Richard Phillipson; and, in considering this point in the case, care must be taken to distinguish which of the letters relating to the 2,000*l.* are brought home to the knowledge of Mary Ann before the loan was made, and it will, I believe, be found that that knowledge is confined to the letters W and X, and the letter of the 12th of October, 1837. Indeed, if all the correspondence between the mother and son as to the 2,000*l.* were read, which in strictness it cannot be, it would not materially affect the case as to the 2,000*l.* as between Mary Ann and the trustees. The inquiry upon *the correspondence must be, did Mary Ann authorise Richard to borrow the trust money upon terms not authorised by the trust, so as to discharge the trustees from the liability to her, and so sanction a loan by the trustees to Richard Phillipson upon terms such as are found in the deed of the 9th of November, 1837, a loan upon personal security not to be called in until six months after the death of Eliza Phillipson. If Richard Phillipson cannot make out such a case from the correspondence, he cannot justify the transaction in question as against his sister, and she certainly is entitled to have the case strictly construed in her favour. Indeed, when the correspondence is examined at large, it will be seen that what the son proposed was, that the trustees were not only to look into and satisfy themselves of the sufficiency of the security, but were to remain liable to the plaintiff for any deficiency. This is repeated again and again in Richard Phillipson's letters. In effect, by acceding to Richard Phillipson's wishes, so far as by not contradicting her mother's statement, she assented to them upon his terms, and those terms reserved her rights against the trustees, which are within the scope of this suit. I cannot, therefore, consider the deed of the 9th of November, 1837, as authorised by the statement in letter W, as between the plaintiff and her brother.

The case, therefore, stands thus: the trustees were originally

liable for 2,000*l.* They have no defence except under Richard Phillipson; and the supposed case under Richard Phillipson fails. I think this is so upon the whole correspondence, but it clearly is so upon the letters of the 1st and 12th of October, 1837, which alone are brought home to Mary Ann Phillipson.

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Next, as to the Northampton mortgage, the agency *of Richard not being established, the case resolves itself into that which, at the time of the argument, I supposed. Did the trustees, by that investment, discharge themselves from liability as to their cestuis que trust? The mortgage-money was 2,183*l.* The value of the security, taking it upon the evidence, was 2,800*l.*, supposing the covenants in the lease of the property let with it to be observed. The covenants relating to other property, if broken, might, as they did, impair the value of the security. The property did not consist of acres of land, which may be let, rendering a rent, but property in a town, the value of which depends upon its position, and is liable, therefore, to be affected by various changes. It was suggested that the alteration created by the railroad materially affected the property. I have examined the case of *Stickney v. Sewell* (1), and it appears to me impossible, without overruling that case, that I can hold that this was a proper security; and, therefore, I must hold in the first suit, that the trustees, as between themselves and Mary Ann, did not by that mortgage discharge themselves from the liability to her.

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Then comes another material question,—are the trustees to replace the stock, or the money produced by the sale? *Mr. Wood* argued that they were liable to make good the money only, distinguishing the sale, which he said was lawful, from the investment, which I have decided to have been a breach of trust. My opinion is, that the trustees must replace the stock. There was no authority to sell, except with a view to the re-investment; and here the sale was made with a view to the investment I have condemned. It was all one transaction, and the sale and investment must stand or fall together.

I think that the second suit, considered as a cross suit by the trustees against Mary Ann Phillipson, does not alter the case as it stands upon the original suit. Stopping here, the decree would be a decree in favour of Mary Ann, as plaintiff, against the trustees, to replace the capital; but as Mary Ann has no present interest in the income, the question would remain, how is the income to be

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dealt with; and this, according to the common course, being a question between co-defendants, would result in an inquiry. In this case, however, the trustees have filed a bill against Mary Ann, and against the mother and son, making claims which include in truth the application of the income of the fund to be brought into Court, or replaced by the trustees. My decision upon the case made in the second suit will dispose of that question, and therefore dispense with the necessity of further inquiry.

The question then is—what is the proper decree to be made in the second suit?

Eliza Phillipson sanctioned the trustees in lending the 2,000*l.*, if they thought fit, to her son; but she gave no guarantee, expressed or implied, to the trustees that she would replace the stock, if any parties more remotely interested should complain. If no sanction had been given by her to the loan, and if there be no contract between her and the son binding her to allow the son to receive the income, she would be entitled to relief as to that. It does not appear to me, that any contract between the mother and son, which the Court can act upon, has been proved; and, therefore, in that simple case the income of the 2,000*l.* would be payable to the mother. But can she make such a claim against the trustees? I think not. By sanctioning the loan of the 2,000*l.* to Richard, she consented, as between herself and the trustees, to take Richard as her debtor for the income of the 2,000*l.* during her life. She can have no claim against the trustees, therefore, in respect of that income, unless she can make out that the effect of the deed of the 9th of November, 1837, is to create a loan upon other terms than those sanctioned. But can she successfully contend for this? Her position is widely different in that respect from that of Mary Ann. Mary Ann gave no sanction to the trustees directly, nor did they know she had permitted her mother untruly to represent to Richard that she (Mary Ann) had consented to the mother herself sanctioning the loan. Eliza Phillipson, after a long treaty for the loan to the son upon personal security, directly sanctioned the trustees in making the loan. She says, indeed, by her answer to the second suit, that she did not intend to sanction them in doing any act not authorised by the original trust; but however that may be, I cannot excuse her as a party to the original settlement from notice that a loan upon personal security was a breach of trust. The income of the 2,000*l.* must, therefore, be paid to the trustees, and she must through them get it from Richard Phillipson. As to the

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Northampton mortgage, Eliza Phillipson must receive the income from that portion of the fund. PHILLIPSON
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The next point is, how does the case stand between the trustees and Richardson Phillipson? He of course is liable for the income of the 2,000*l.*, and cannot, in my opinion, complain of the Northampton mortgage. But is Richard Phillipson to pay the 2,000*l.* at once, treating the loan as a breach of trust, to which he was a party, or is the contract of the 9th of November, 1837, to stand good as between him and Eliza Phillipson on the one side, and the trustees on the other? The question is, why, on a bill framed as this is, not as was *observed in *Franco v. Franco* (1), to execute the trust, but a suit between the trustees and Richard Phillipson, both parties to a breach of trust,—why am I to alter the contract voluntarily made between them,—a contract specified in a deed, and guarded by mutual covenants. In *Franco v. Franco* the loan which constituted the breach of trust was for a temporary purpose, and the bill did not infringe upon, but was consistent with, the contract between the parties to the breach of trust. That is not the case here. Here the contract is for a loan upon personal security for a definite period ending six months after the death of Eliza Phillipson. I think I ought not to set aside that contract as between the parties to it,—the interests of the cestuis que trust being unaffected by it,—for they by the supposition are not precluded from suing the trustees, nor from suing Richard as a party to the breach of trust, although they are not bound to sue any but their trustees.

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Direct the trustees to pay into Court 2,000*l.*; the same, when paid in, to be invested &c., and let the dividends thereon be paid to the trustees during the life of Eliza Phillipson, with liberty to apply upon her death. Direct the premises comprised in the mortgage to be sold, with the approbation of the Master, &c., and let the monies to be produced by the sale be paid into Court, and invested &c., and the dividends to be paid to Eliza Phillipson, widow, during her life, with liberty to apply upon her death. Declare that the trustees ought to make up the difference between the Consols and money to arise from the sale of the mortgaged premises and the 2,347*l.* 10*s.* 2*d.* Consols, in case the money to arise from the sale shall not be sufficient to purchase the said 2,347*l.* 10*s.* 2*d.* Consols.

The decree was affirmed by the LORD CHANCELLOR on the 10th of March, 1849, [as reported in 2 H. & Tw. 459], but Eliza

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Phillipson having died since the decree of the VICE-CHANCELLOR, the same was by consent varied, by directing the trustees to pay Mary Ann Phillipson 1,000*l.*, one moiety of the 2,000*l.* secured by the deed of the 9th of November, 1837. [The following report of the LORD CHANCELLOR's judgment on the appeal is taken from 2 H. & Tw. p. 462.]

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I stated yesterday what my opinion was as to the rights of these parties; but I abstained from disposing of the case until I had had an opportunity of looking through the pleadings. It struck me, that there was considerable difficulty in carrying out what appeared to me to be the rights of the parties, as they now exist, in consequence of the death of the mother; and, in looking at the pleadings, that difficulty, so far from being removed, seems to me to be increased. The bill makes no case against the son at all; it merely makes him a party as being interested in the fund; it prays no relief against him, and makes no case against him, either with regard to the one security, or with regard to the other; and in that state of things, unless with the concurrence of the parties, it is very difficult to carry into effect what appears to me to be the justice of the case.

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I will take the 2,000*l.* The 2,000*l.* is advanced upon a certain security not warranted by the trusts; and, therefore, it is a direct breach of trust on the part of the trustees; but one of the cestuis que trust is a party to that transaction, and has actually got the money. But the money beyond all doubt, independently of the question which I expressed an opinion upon yesterday, that the sister was *not barred by anything that had taken place from asserting her right against the trustees, declares the trustees are liable for that breach of trust; but then the son has the security and has the money, and he is not made a defendant in respect of that liability at all, nor is any relief prayed against him in respect of that liability. As the decree stands, it calls upon the trustees to pay, and they have actually paid, as I understand, 1,000*l.*, that is, the plaintiff's share. But then a question is left open for litigation between the trustees and the son, and that is by no means a desirable state of things; it has answered the plaintiff's purpose no doubt, but if the suit had been framed according to the facts as they now exist, and relief had been prayed in conformity with those facts, although the plaintiff would have a right to disregard the investment altogether, not being according to the trusts, and to

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proceed against the trustees for the breach of trust, yet, inasmuch as the sum is secured, and adequately secured probably, to the extent, at least, of the plaintiff's interest, to terminate the contest between them, they ought to realise the fund and pay the plaintiff out of that fund; and the trustees who have lent it, and no breach of trust as between those parties. That would no doubt do justice between the parties, as far as that part of the case goes; but I cannot do that upon the decree, without the concurrence of the son. If the brother would take upon himself to consider the debt of 1,000*l.* as being the 1,000*l.* advanced by the trustees, (which is the fact), if he would pay that 1,000*l.* out of his security, the matter may be settled between the parties; and it appears to me, that is what the justice of the case requires. I think it would be the most expedient course for the parties to adopt, because it might put an end to all litigation, which litigation would only have one object, namely, realising the 1,000*l.* out of that security held by the son. Now, if the *Solicitor-General*, who appears on the part of the son, is prepared to take a decree with that view, that may be done.

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(The *Solicitor-General* acceded on the behalf of the son.)

Then it is quite clear: that puts an end to that part of the case. I think that the trustees and the son must settle it between them—it was trust money that they advanced, and they made a particular arrangement as to it. Under that arrangement, between the son and the trustees, that 1,000*l.* was paid, and it should be paid to the plaintiff; there is no reason why it should be paid into Court. That part of the case is concluded, and the plaintiff gets back her money, and there is an end to the contest, as far as that security is concerned. I should propose then, with the *Solicitor-General's* concurrence upon that part of the case, that the son should pay the plaintiff her share of the 2,000*l.*; and upon that payment being made, let the trustees be at liberty to apply for that money in Court to be taken out of Court. Then, with regard to the costs, I cannot make the son pay any costs. I would willingly, if I could, but there being no case made against the son, I cannot make him pay the costs of that relief which is granted with his concurrence. I think the decree should stand as against the trustees with regard to that part of the case, substituting this arrangement; the decree of the VICE-CHANCELLOR is confirmed as to that.

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Now, with regard to the other sum, the decree must be as I suggested it; but at present it goes further, and it declares that the trustees are liable to the plaintiff for the sum invested in the Northampton mortgage, whatever that sum is, as far as realising the fund goes, it is obvious that is the first thing to be done; and with regard to that, the question arises how far the son is to be paid his share out of that mortgage. That is a question which is rather premature to dispose of now: it is a mere speculation what the security may produce, *and I do not see how I can avoid reserving that question. As to this security again, there is nothing asked against the son, and no relief prayed against him—he is merely made a party, sought to be affected as being a party to the breach of trust. Then, again, the frame of the bill (I do not say it was not properly framed under the circumstances then existing) is not exactly adapted to the state of facts as they appear now, arising from the death of the mother. Beyond all doubt, the trustees are liable independently of the question which *Mr. Bethell* argued as to the supposed acquiescence of the daughter in the investment. It was an investment not only on an inadequate security, but on a security of a character at all events which did not come within the ordinary rule of freehold property, and which might vary in value; and it was not a permanent property always likely to be of the same value. It requires very great care in ascertaining that property is ample in point of value to meet all the contingencies to which it is liable. The question here is between the trustees and the son, whether it is to come out of his share, or whether it is to be borne by them. They had not any authority to make him their agent at all, they ought to have exercised vigilance in taking care that those who were interested in the fund should have their interest properly secured; but, unless anything can be suggested now (and that is a matter between the two defendants), the plaintiff ought to be reimbursed that which she is entitled to. I think that the plaintiff has established a claim to the moiety of that fund, as well as to the moiety of the other, and she is entitled as against the trustees. Whether the son is primarily liable for his share of the mortgage money is a question as to which I do not think the case is ripe for decision. My present impression is, unless any other mode can be suggested to answer the purpose, that you must realise the mortgage, and reserve all further directions between the parties. The trustees must pay the *costs of that part of the suit as well as of

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the other, because the son is not made a defendant in that respect. There is no relief prayed against him. Nothing else upon that part of the case can be imputed, but negligence, to the trustees, they having acted upon representations which turned out to be unfounded; and this has led to a deficiency of the security to realise the fund, to one moiety of which the plaintiff is entitled.

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By the LORD CHANCELLOR'S decree, it was ordered—Mary Ann Burton Phillipson, the plaintiff in the first suit, and one of the defendants in the second, and the defendant Richard Burton Phillipson, by their counsel severally consenting thereto—that Richard Burton Phillipson should, within six weeks from the date of the order, pay to Mary Ann Burton Phillipson the sum of 1,000*l.*, being one moiety of the sum of 2,000*l.* secured by the indenture of the 9th of November, 1837, together with the interest on the said sum of 1,000*l.* at the rate of 4*l.* per cent. per annum, from the 9th of February, 1849, the day of the death of the late defendant Eliza Partridge Burton Phillipson: And, upon such payment of the 1,000*l.*, and interest, to Mary Ann Burton Phillipson, Edward Gatty and Edward Owen the younger were to be at liberty to apply to the Court as they might be advised, for transfer and payment to them of the 1,098*l.* 18*s.* Bank 3*l.* per cent. Annuities, standing in the name of the Accountant-General in trust in the first-mentioned cause, and the sum of 92*l.* 0*s.* 2*d.* cash remaining on the credit of the first-mentioned cause, which cash had arisen from dividends on the said Bank Annuities.

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(7 Hare, 532—564; 18 L. J. Ch. 473; 13 Jur. 694.)

The master of a grammar school, appointed by the Dean and Chapter of a cathedral church, which grammar school was, by the statutes imposed by the founder, directed to be established and maintained from the endowments of the church, which were held in frankalmoigne: Held, not to be a cestui que trust of the stipend and emolument of the office, but to be only an officer of the cathedral church, appointed to perform one of the duties imposed upon it by the statutes.

In such a case, whoever may be visitor,—whatever may be the interest of the visitor in the matter in dispute, or whatever may be the right of the schoolmaster to a *mandamus* or prohibition at law,—the Court of Chancery cannot, in the exercise of its ordinary jurisdiction by bill, try the right of the schoolmaster to his office.

1849.
July 27.
Aug. 1, 2, 8.

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about a right of office, as a matter of course, to prevent the party from being displaced until the right shall have been tried. There are cases, even of irreparable mischief, in which the Court cannot give any ultimate relief, and will not therefore interfere between adverse claimants.

THE Cathedral Church of Rochester was founded and endowed in the 88rd year of Henry VIII., with estates which had belonged to the dissolved monastery or priory and church of St. Andrew, of that city, to hold such lands and hereditaments to the Dean and Chapter, and their successors, from the King and his successors, "*in puram et perpetuam eleemosynam.*"

The statutes given by the King for the government of the cathedral body were as follows :

De numero integro eorum qui in Ecclesia Cathedrali Roffensi sustententur.

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Imprimis, statuimus et ordinavimus ut sint perpetuo in dicta Ecclesia unus Decanus, sex Canonici, sex Minores Canonici, unus Diaconus, unus Sub-diaconus, sex Clerici Laici, unus Magister Choristarum, octo Choristæ, duo Informatores Puerorum in Grammaticâ, quorum *unus sit Præceptor, alter Sub-præceptor, viginti Pueri in Grammaticâ erudiendi, sex Pauperes de sumptibus dictæ Ecclesiæ alendi, duo Sub-sacristæ, unicus Janitor, qui et Barbitonsor erit, unus Pincerna, unus Coquus, unus Sub-coquus. Qui quidem in eadem Ecclesia Cathedrali numero præscripto, unusquisque in suo ordine, juxta statuta et ordinationes nostras, sedulo inserviant.

De Qualitatibus, Electione, et Admissione Decani. Juramentum Decani (1).

De Officio Decani.

De Visitatione Terrarum.

Demissio Terrarum et Tenementorum ad Firmam.

De Traditione Bonorum Decano.

De Residentiâ Decani.

De Obedientiâ Decano, &c. Monstranda.

Quum doceat Divus Paulus Præpositis obediendum esse : volumus et mandamus ut jam Canonici et cæteri Ecclesiæ nostræ Ministri, omnes et singuli, ipsum Decanum caput suum et ducem agnoscant, ipsumque revere[a]ntur, et in omnibus rebus ac mandatis licitis et

(1) Only those statutes, and parts the master of the school. The titles of statutes, are fully set out, which of the whole are stated. were thought to affect the position of

honestis, quæ statuta nostra concernunt, aut ad bonum regimen et statum Ecclesiæ nostræ pertinent, ipsi Decano aut ipsius Vicegerenti, aut, illis absentibus, seniori secundum admissionem Canonico pareant, obedient, adstant, et auxiliantur.

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De Qualitatibus, Electione, et Admissione Canoniorum. De Juramento Canoniorum.

De Residentiâ Canoniorum.

De Canonicis in Ecclesia nostra habendis.

De Mensa Canoniorum.

De Stipendio Decani et Canoniorum.

De Electione Officiariorum, et Pœna Absentium Tempore Electionis Officiariorum. [534]

De Officio Vice-decani.

De Officio Receptoris.

De Officio Thesaurarii.

De Qualitate, Electione, et Admissione Minorum Canoniorum et Clericorum. Juramentum, &c.

De Residentiâ Ministrorum.

De Præcentore et ejus Officio.

De Sacrista et Sub-sacrista.

De Choristis et eorum Magistro.

De Pueris Grammaticis et eorum Informatoribus.

Ut pietas et bonæ literæ perpetuo in Ecclesia nostra suppulescant, crescant, floreat, et suo tempore in gloriam Dei, et Reipublicæ commodum et ornamentum fructificent, statuimus et ordinamus, ut ad electionem et designationem Decani, aut eo absente Vice-decani, et Capituli, sint perpetuo in Ecclesia nostra Roffensi viginti pueri pauperes et amicorum ope destituti, de bonis Ecclesiæ nostræ alendi, ingeniis (quoad fieri potest) ad discendum nati et apti. Quos tamen admitti nolumus in pauperes pueros Ecclesiæ nostræ antequam noverint legere, scribere, et mediocriter calluerint prima Grammaticæ rudimenta, idque judicio Decani et Archi-didascali; atque hos pueros volumus impensis Ecclesiæ nostræ ali, donec mediocre Latinæ Grammaticæ notitiam adepti fuerint, et Latine loqui et Latine scribere didicerint; cui rei dabitur quatuor annorum spatium, aut, si ita Decano et Archi-didascalo visum fuerit, ad summum quinque annorum et non amplius. Volumus autem ut nullus nisi Ecclesiæ nostræ Roffensis Chorista fuerit in pauperem discipulum Ecclesiæ nostræ eligatur, qui nonum ætatis suæ annum non compleverit, vel quintum decimum ætatis suæ annum non

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excesserit. * * * (1) Statuimus præterea, ut, per Decanum, vel eo absente *Vice-decanum, et Capitulum, unus eligatur Latine et Græce doctus, bonæ famæ et piæ vitæ, docendi facultate imbutus, qui tam viginti illos Ecclesiæ nostræ Pueros, quam alios quoscunque Grammaticam discendi gratia ad Scholam nostram confluentes, pietate excolat et bonis literis exornet; hic in Schola nostra primus obtinebit, et Archi-didascalus sive Præcipuus Informator esto. Rursum per Decanum, aut eo absente Vice-decanum, et Capitulum volumus, virum aliquem eligi, bonæ famæ et piæ vitæ, Latine doctum, docendique facultate imbutum, qui sub Archi-didascalo pueros docebit prima scilicet Grammatices rudimenta, et proinde Hypo-didascalus sive Secundarius Informator appellabitur. Hos vero Informatores Puerorum volumus, ut regulis et docendi ordine, quem Decanus et Capitulum præscribendum duxerint, diligenter et fideliter obsecudent. Quod si desidiosi, aut negligentes, aut minus ad docendum apti inveniantur, post trinam monitionem á Decano et Capitulo amoveantur, et ab officio deponantur. Omnia autem ad functionem suam spectantia se fideliter præstituros juramento promittent.

De Pauperibus et eorum Officio.

De Inferioribus Ecclesiæ nostræ Ministris.

De Communi Mensa omnium Ministrorum.

* * * * *

In quâ quidem aulâ Præcentor, vel eo absente primus admissione Minor Canonicus, in superiore mensa primus accumbat. Deinde Archi-didascalus et cæteri Minores Canonici et Magister Choristarum. In secundo ordine sedeant Diaconus et Sub-diaconus, sex Clerici et Hypo-didascalus. In tertio ordine sedeant Pueri Grammatici et Choristæ. In secundo prandio sedeant Sub-sacristæ, Pincerna, Janitor, et Coquus. Morum Censor in Aulâ erit Præcentor, aut eo absente primus admissione *Minor Canonicus, qui viros immorigeros arguet; Pueros autem arguent etiam ipsorum Præceptores, ut omnia cum silentio, ordine, et decore agantur in Aulâ.

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Nimirum pro vescentibus in primo ordine, id est, pro singulis Canonicis Minoribus, pro Primario Informatore Puerorum Grammaticorum, et pro Magistro Choristarum, per mensem, sex solidos pro mensa et communiis communiter vescentium. In secundo ordine, nimirum pro Diacono et Sub-diacono, singulis Clericis, ac Inferiore

(1) The asterisks on this and the following pages occur in the original report.

Informatore Puerorum Grammaticorum, per mensem, quatuor solidos et octo denarios pro mensa et communiis singulorum communiter vescentium. In tertio ordine, nimirum pro singulis Pueris Grammaticis et Choristis, per mensem, tres solidos et quatuor denarios.

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Postremo omnes Ministri Ecclesiæ nostræ communiter victitantes ordinationibus, formulis, et statutis, quæ per Decanum et Capitulum hisce de rebus olim edentur, parere et obsequi debent.

De Vestibus Ministrorum quas Liberatas vocant.

* * * * *

Recipient singuli Minores Canonici et Superior Informator Grammatices quatuor virgatas panni pro togis suis, pretium cujuslibet virgatæ quinque solidos. Recipiet Magister Choristarum pro veste sua tres virgatas panni, pretium virgatæ quinque solidos. Recipient Diaconus, Sub-diaconus, singuli Clerici, et Inferior Informator Grammatices pro vestibus tres virgatas panni, pretium virgatæ quatuor solidos. Recipient et alii ministri

* * * * *

De Stipendiis Ministrorum in Ecclesia Nostra.

Statuimus et volumus ut ex bonis communibus Ecclesiæ nostræ, præter communias et liberatas superius assignatas, solventur stipendia omnibus ministris Ecclesiæ nostræ per manus Thesaurarii singulis anni terminis, per æquales portiones, ad hunc qui sequitur modum, viz.

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	£	s.	d.
Singulis Minoribus Canoniciis pro portione sua	5	2	8
Superiori Informatori Grammatices	8	8	8
Magistro Choristarum	5	7	0
Inferiori Informatori Grammatices	2	19	2
Diacono	2	19	2
* * * * *			

De Celebratione Divinorum.

* * * * *

Volumus præterea ut uterque Informator Grammatices, Diebus Festis, Choro intersit, Insignibus Choro convenientibus indutus; quorum alter super Minores Canonicos, alter post Minores Canonicos proximum in Choro locum obtinent. Ad hæc Pueros Grammaticos qui sumptibus Ecclesiæ nostræ aluntur, festis diebus volumus

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Choro interesse, et officium sibi mandatum à Præcentore sedulo
facere, nisi alias per Hypo-didascalum amendantur (1).

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De Communi Ærario, de Custodia Sigilli et Munimentorum.

De Ratione seu Computo quotannis reddendo.

De Corrigendis Excessibus.

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Ut in Ecclesia nostra morum integritas servetur, statuimus et volumus, ut si quis Minorum Canonicorum, Clericorum, aut aliorum ministrorum, in levi culpa deliquerit, arbitrio Decani, aut eo absente Vice-decani, corrigetur. Sin gravius fuerit delictum (si justum judicabitur) ab iisdem expellatur à quibus fuerit admissus. Si quis autem Canonicorum in offensa aliqua *aut crimine, unde Ecclesiæ nostræ grave scandalum oriri possit, culpabilis inventus fuerit, is per Decanum, aut eo absente Vice-decanum, admoneatur; quod si, tertio admonitus, se non emendaverit, apud Episcopum Visitatorem suum accusetur, et illius judicio corrigatur. Pauperes vero quoties deliquerint correctionem Decani, aut eo absente Vice-decani, judicio reservamus; qui si incorrigibiles permaneant, per Decanum, cum Capituli consensu, à nostrâ Ecclesiâ expellantur, et omnia in eâ emolumenta perdant.

De Eleemosynis et Scholasticis in Academiis Studentibus.

* * * * *

Statuimus præterea, ut ex bonis Ecclesiæ nostræ quatuor Scholares pauperes in Academiis nostris semper alantur, qui in artium liberale ac in sacræ theologiæ studia assidue et diligenter incumbunt; duo videlicet in Academia Oxoniensi et duo alii in Academia Cantabrigiensi. Neminem vero alium ad hoc nostrum beneficium percipiendum admitti volumus, nisi qui sit super quintum decimum et infra vicesimum ætatis suæ annum, quique Grammatica[m] ita calleat, ut ad liberales artes discendas aptus et idoneus existat. Hos autem quatuor scholasticos volumus ut Decanus, aut eo absente Vice-decanus, et Capitulum ex hâc nostrâ scholâ semper eligant, et stipendio nostro donatos ad Academiam ingenii cultum capiendi gratia mittant. Quod si in hâc Scholâ nostrâ nullus huic muneri idoneus inveniatur, alium undecunque prædictis qualitatibus ornatum, Decano, aut eo absente Vice-decano, et Capitulo deligere permittimus, in dictis Academiis Collegii aut Domus alicujus Socius aut Discipulus modo non fuerit. His Scholaribus pro studiorum suorum progressu varias quotannis numerari volumus pensiones,

(1) A Ciceronian though not common word.—F. P.

videlicet, donec Baccalaureatûs insignia adepti fuerint, id quod intra quadriennium omnino fieri duxerimus, quinque libras; *Baccalaurei autem per triennium proxime sequens, post quod tempus statim Magister Artium titulo eos insignire volumus, sex libras assequuntur; postea vero, ut ardentius sacræ Theologiæ incumbant, sex libras et tredecem solidos et quatuor denarios recipient; illud etiam decernimus, ut decedentibus sive amotis, sive Baccalaureis, seu Artium Magistris, aut superiori Gradu insignitis, illi qui numero deficientium supplebunt, in primi ordinis scholastic[o]s admittantur. Decanus autem, aut eo absente Vice-decanus, curabit ut hii Scholares Pensionarii ad certum aliquem locum, seu Collegium, seu Aulam, seu Hospitium in Academia una aut altera destinentur. Quod si intellexerit, certoque cognoverit, negligentes, desidiosos, aut ab Academia evagantes quique famam suam à gravioris criminis nota non tuentur, quique Baccalaurei aut Artium Magistri non fuerint præscripto tempore, quique postea Theologiæ studio gnavam operam non impenderent, qui denique præter pensionem nostram summam septem librarum annui valoris adepti fuerint, hac nostra pensione et stipendio penitus destitui et carere volumus.

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De Capitulis celebrandis.

De Visitatione Ecclesiæ.

* * * * *

Nos, Episcopi Roffensis qui pro tempore fuerit fide et diligentia freti, eundem Ecclesiæ nostræ Cathedralis Roffensis Visitatorem constituimus, volentes et mandantes, ut pro Christiana fide et ardenti Pietatis zelo vigilet, et graviter curet, ut hæc statuta et ordinationes Ecclesiæ nostræ à nobis editæ inviolabiliter observentur, possessiones et bona tam spiritualia quam corporalia prospero statu floreant, jura, libertates, et privilegia conserventur et defendantur. Atque ut hæc ita fiant, statuimus et volumus, ut Episcopus ipse, quoties à Decano vel à duobus Canonicis rogatus fuerit, imo licet non *rogatus, semel tamen quovis triennio ad Ecclesiam nostram in persona propria (nisi grandis obstiterit necessitas), alioquin per Cancellarium suum accedat, Decanum, Canonicos, Minores Canonicos, Clericos, cæterosque omnes Ecclesiæ nostræ Ministros, in locum congruum convocet. Cui quidem Episcopo præsentis statuti vigore plenam concedimus potestatem et auctoritatem, ut super singulis articulis in statutis nostris contentis, et de quibuscunque aliis articulis statum, commodum, aut honorem Ecclesiæ nostræ concernentibus, Decanum, Canonicos, Minores Canonicos,

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cæterosque Ministros interrog[et], et cogat eorum quemlibet per juramentum Ecclesiæ præstitum veritatem dicere de omnibus delictis et criminibus quibuscunque compertis et probatis: juxta delicti et criminis mensuram puniat Episcopus atque reformet, omniaque faciat quæ ad vitiorum reformationem necessaria videbuntur, quæque ad visitatoris officium de jure pertinere dignoscuntur. Quos quidem omnes, tam Decanum, quam Canonicos et alios Ecclesiæ nostræ Ministros, quoad omnia præmissa, volumus et mandamus ipsi Episcopo parere et obedire. Statuimus autem in virtute juramenti Ecclesiæ nostræ præstiti, ut nemo contra Decanum, aut Canonicos, aut aliquem Ministrorum Ecclesiæ nostræ quicquam dicat aut enunciet, nisi quod verum crediderit, aut de quo publica vox et fama circumlata fuerit.

* * * * *

De Precibus, &c.

The plaintiff was appointed head master of the Grammar School of the church, at a Chapter holden on the 1st of December, 1842, and thereupon took the oath prescribed for the minor canons and ministers. The stipend of the plaintiff as master, was fixed by the Chapter at 150*l.* per annum, with the free occupation of a house, and a portion of the payments which should be made for the instruction, in the school, of boys not upon the foundation.

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In the month of February, 1848, the plaintiff called the attention of the Dean and Chapter to the circumstance of the inadequacy of the sums mentioned in the statute and allowed for the maintenance of the four scholars at the Universities, and to the propriety and justice of augmenting the four exhibitions by a sum proportioned to the diminished value of the currency, and the increase of the revenues of the cathedral body. The plaintiff again made a similar communication in the month of June following; to which the Chapter-clerk, by the direction of the Dean and Chapter, replied on the 30th of that month, acquainting the plaintiff that the Dean and Chapter did not doubt the correctness of the facts he mentioned, but that he was mistaken in his inferences respecting the obligation imposed upon them by the statutes.

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[After some further correspondence of a similar character, the plaintiff applied to the Bishop, and] he was in April, 1849, informed by the Bishop, that, after due inquiry, his Lordship found that the Court of Chancery was the proper tribunal before which the plaintiff must lay his complaint against the Dean and Chapter of Rochester.

In May, 1849, the plaintiff published a pamphlet, intituled

“Cathedral Trusts, and their Fulfilment;” in which the subject of the distribution of cathedral revenues, and the efforts which the plaintiff had unsuccessfully made in the case of the Rochester scholars, were stated and discussed, [and the pamphlet charged the Dean and Chapter with disregard of duty and justice “under aggravated circumstances of malversation”].

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At a Chapter holden on the 28th of June, 1849, it was resolved to remove the plaintiff from his office of master; and an instrument, setting forth the grounds of the proceeding, was sealed. The instrument was read to the plaintiff, who attended the Chapter in compliance *with a summons to that effect, and a copy was delivered to him.

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[The instrument, after reciting various passages from the pamphlet, proceeded as follows:] “And whereas the said Robert Whiston, master of the Grammar School of the said Cathedral Church of Rochester, by writing and causing the above pamphlet to be printed and published, has been guilty of a very grave offence, and, in the judgment of the Dean and Chapter, has proved himself to be utterly unfit and unworthy to be any longer intrusted with the instruction and superintendence of the foundation boys in their Grammar School; and the said Dean and Chapter, in Chapter duly assembled, have resolved that he is unfit and unworthy to continue in the office of master of the Grammar School of the said Cathedral Church of Rochester, and that he hath, by such his misconduct as aforesaid, forfeited all the rights, advantages, privileges, and emoluments of that office; and have resolved and ordered that he be forthwith amoved, removed, deprived, and displaced of and from the office of master of the said Grammar School, and of and from all houses, lands, profits, emoluments, commodities, advantages, and appurtenances whatever, to the said office in anywise incident, belonging, or appertaining. Now know ye, that we, the Dean and Chapter of the Cathedral Church of Christ and the Blessed Virgin Mary of Rochester, have, by our whole and mutual assent, consent, and agreement, deprived, amoved, removed, and displaced, and by these presents, for ourselves and our successors, do deprive, amove, remove, and displace the said Robert Whiston of and from the said office and place of upper and head master of the King’s School or Grammar School of and belonging to the said Cathedral Church of Christ and the Blessed Virgin Mary of Rochester, and of and from all houses, lands, fees, stipends, allowances, perquisites, payments, sum and sums of money, augmentations, pensions, profits, emoluments, *commodities, rights, liberties, claims, advantages, and appurtenances

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whatsoever, to the said office and place incident, belonging, or in anywise appertaining, or with the same now or at any time heretofore had, held, occupied, used, taken, or enjoyed. In witness," &c.

The plaintiff filed his bill against the Dean and Chapter for an injunction to restrain them from removing him from his office of upper or head master, and from proceeding to the election of any other person as head master of the school during the plaintiff's retention or incumbency of the office; and from impeding or in any manner interfering with the plaintiff in the enjoyment of his rights, interests, and privileges as such head master; and from bringing any action or other proceeding against the plaintiff to disturb him in his office, or in the exercise or performance of his powers or duties, or in the enjoyment of his rights, interests, or privileges. A motion for an injunction was made in the terms of the prayer.

The *Solicitor-General* and Mr. D. W. Lewis, for the motion :

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First, the publication of the pamphlet, which is the subject of complaint, was neither an offence against the statutes nor a breach of duty in the plaintiff as schoolmaster. That it raised a question of grave inquiry in a legal point of view, cannot be doubted: *Attorney-General v. Mayor of Bristol* (1). The charge with reference to the neglect of cathedral trusts extended to the cathedrals of the new foundation generally, and not to Rochester alone. The office of schoolmaster rather imposed *the duty of bringing forward the claims of the scholars; and, after applying to the Dean and Chapter in vain, the plaintiff cannot be blamed for seeking to avail himself of the influence of public opinion and sympathy. The statute "*De Visitatione*" contained an implied sanction of such a course. The plaintiff had not departed from the tone or language in which a public question might properly and energetically be discussed. It was impossible not to say, there were duties imposed and not fulfilled. No individual was, however, named, and no personal attack or invective was resorted to. It was not the falsehood, but the truth of the reasoning which had provoked the hostility of the defendants. The Dean and Chapter had, it was true, only followed the steps of their predecessors, and this might have placed them in the unhappy position of parties who were committing almost a prescriptive wrong; but it was not the less a wrong.

Secondly, the plaintiff was not one of the "*ministri*" within the statute "*De Corrigendis Excessibus*." In conformity with the

statute, "*si desidiosi, aut negligentes, aut minus ad docendum apti incremiantur*," the schoolmaster might be removed; but the defendants did not insist on any such ground, or on any cause, which, by the express words of the statutes, or by implication, could be brought within them. The defendants, indeed, had not professed to act in pursuance of the statutes.

Thirdly, supposing the removal to have been founded upon any statutable cause, it was illegal and void, inasmuch as it was a judgment pronounced without the shadow of a trial, or even a hearing. [On this point they cited *Rex v. Bishop of Ely* (1), *Doe v. Gartham* (2).]

Fourthly, the plaintiff had then been wrongfully removed from the office, and deprived of the stipend and house which had been assigned to him in virtue of his office, and the question was only as to the form of his remedy. The plaintiff had no remedy in the Ecclesiastical Court. The case must be governed by the founder's statutes, and was not within the ordinary ecclesiastical constitution of the Church. * * *

Fifthly, the plaintiff having no remedy in any Court of limited jurisdiction, could only appeal to a Court of common law or a court of equity. * * *

Sixthly, the plaintiff, however, relied on the broad ground, that the defendants were trustees of their funds, to satisfy, among a variety of purposes, the schoolmaster's stipend. There was a trust for the school and for the schoolmaster, as the person who embodied and represented the idea of the school. [On this point they cited *Attorney-General v. Christ's Hospital* (3), and distinguished the present case from that of *The Attorney-General v. Magdalen College, Oxford* (4).]

Mr. Roundell Palmer and Mr. J. H. Law, for the defendants :

The application was founded upon the mistake of supposing, that the defendants were trustees for their officers. There was no trust in this case, within the sense in which that term was understood in equity. The school of which the plaintiff had been master, was one of a class, peculiar to cathedral churches, or, before the Reformation, to cathedrals and monasteries. The error was, in supposing that this school stood in the same position as a simple grammar school within the control of this Court, in the exercise of its jurisdiction

(1) 1 R. R. 486, 487, 488 (2 T. R. 336, 338).

(2) 25 R. R. 649 (1 Bing. 357; 8 Moore, 368).

(3) 32 R. R. 302 (1 Russ. & My. 626; Taml. 393).

(4) 76 R. R. 148 (10 Beav. 402).

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over charitable foundations. This belonged to the class of claustral, as distinguished from secular grammar schools. The claustral schools had no independent endowments, but depended on the bodies to which they were attached. "Grammar schools in the country and in some cities were lately maintained with the revenues of chauntries, that belonged to those churches; wherein, or else in chauntry-houses, the priest taught. So that, the chauntries being dissolved, the schools fell with them:" Hist. and Antiq. Un. Oxford, by Anthony à Wood, vol. 2, p. 103. So, in this case, the school was only a part of the cathedral establishment, and not an independent or a separate foundation: *Attorney-General v. Magdalen College, Oxford* (1), *Rex v. Bishop of Ely* (2). The master of the school was one of the officers employed in the internal administration of the cathedral establishment. He could not be regarded as a cestui que trust, otherwise than as the porter, cook, and other officers, whose maintenance was provided for by the statutes, were entitled to that character. All those officers, including the *school-master, were allowed to participate in the common goods, or (as described in the stat. 3 & 4 Vict. c. 113, s. 52) the "divisible corporate revenues," but they had no independent rights as cestuis que trust. The cathedral church and its officers were governed by the statutes, and their regulation was not left open and subject to the jurisdiction of the Court of Chancery: *Attorney-General v. Middleton* (3). The jurisdiction was in the Bishop, as laid down in the statute "De Visitatione Ecclesiæ" (4). If the visitor, where the visitatorial power existed, refused to act, he might be compelled to do so by *mandamus*, and if he exceeded his powers, he might be restrained by prohibition, but there was no appeal against his judgment: *Attorney-General v. The Master and Fellows of Catherine Hall, Cambridge* (5), *Rex v. Bishop of Chester* (6). * * *

[556] The defendants objected to the jurisdiction in this case only as an important duty to their successors, and other bodies of the same constitution. They would prefer to argue the case on its merits. The language of the publication of which they complained was calculated to bring disrespect and contempt upon the Dean and Chapter, and to impede them in the performance of their duties. It was, moreover, an unfair and inaccurate representation of the case as against the Dean and Chapter. * * *

(1) 76 R. R. 148 (10 Beav. 402).

(4) *Supra*, p. 249.

(2) Duke's Charitable Uses, Bridgman, 331.

(5) 23 R. R. 92, 99 (Jac. 381, 392).

(6) 1 W. Bl. 22.

(3) 2 Ves. Sen. 327.

The *Solicitor-General*, in reply :

* * The argument founded on the power of the visitor could scarcely avail the defendants in this case. If the plaintiff had misconducted himself as they allege, it was their duty to bring the case before the visitor, and not to act upon their own authority where the statutes were silent. By the course adopted the defendants had in effect themselves superseded or assumed to supersede the authority of the visitor, to whom, according to their present argument, the case ought to have been referred. The very argument itself amounted to an admission that the defendants had acted illegally, and established a case, at least for the temporary interference of the Court; for the jurisdiction of the visitor, if now appealed to and exercised, would not protect the plaintiff in the enjoyment of the temporalities of his office, by preserving his stipend and emoluments, such as the enjoyment of the house assigned to him, pending a trial before the proper Court: *Rex v. The Bishop of Durham* (1). The Court would therefore grant the injunction.

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I have never entertained a doubt, that, if it could be established that the Dean and Chapter were trustees for the master of the Grammar School, he would be entitled *to the assistance of the Court in enforcing the execution of the trust. If the appointment of the plaintiff as schoolmaster gave him a right to the stipends prescribed by the statutes as a cestui que trust against his trustees, there is no question whatever that the mere circumstance of the Dean and Chapter being a corporation or an ecclesiastical body would not remove the case from the jurisdiction of the Court. Two questions arise on the present motion: first, whether the plaintiff is such cestui que trust; and, secondly, if he be so, whether he has been lawfully displaced. Supposing the Bishop to be the visitor, and that he has not interfered, I do not know why the Court should not in a plain case declare the right of the plaintiff; or, if the case were one of more difficulty, the Court might retain the proceedings, giving liberty to the party to proceed by action at law, or might direct an issue, or order the proceedings to stand over to enable the parties to try the question at law by an application for a *mandamus*. One of these courses must be taken, assuming the case to be clearly one of trust. It cannot, however, be denied that there are cases,—I do not say that this is one of them,—in which

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the jurisdiction is in the visitor, and not in a court of equity. The case of *Magdalen College* (1) is an example of that class of cases. If the case be within the scope of those decisions, and the jurisdiction be altogether in the visitor, the question will arise, whether I can interfere. No doubt many incidental questions may arise, giving a court of law or equity jurisdiction. The visitor may not have acted, or may have declined to act. The right course in such cases may be to apply to the Court of Queen's Bench for a *mandamus*; or, if the Bishop be about to interfere where he has no jurisdiction, the party may apply for a prohibition.

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There is great difficulty in drawing the line between colleges where there are fellows and various other persons who receive stipends under the statutes of such colleges, and establishments of the kind now before the Court, where there exists a common fund, which has been given to the body by the founder, who has chosen to direct in what manner that body should act, and has imposed the obligation of maintaining a certain number of officers having particular duties, and to whom particular stipends are directed to be paid. Although, in speaking of the office of schoolmaster, he has been adverted to in argument as an individual standing upon the same footing as subordinate officers,—such as the janitor or others,—it is only for the purpose of illustrating his legal position; for the duties of the schoolmaster are acknowledged, and undoubtedly are, of a very high order. For the purpose of the argument, the founder is considered as saying, that there shall be certain funds, and certain officers payable out of those funds, such as a schoolmaster, choristers, and others, who shall fill various offices, and perform various duties. All these persons apparently fall within the same category in point of description, although they are unequally paid, and their duties are not of equal importance. Unless it is to be argued that the janitor, for instance, on being discharged, may come to this Court and allege a trust in his favour, and call upon the Court to decree accordingly, it may be difficult to say that the master, if he be within the same category, has a right to come to the Court and allege such a trust. I must carefully read the statutes, and examine the cases which have been cited.

Aug. 8.

THE VICE-CHANCELLOR :

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At the close of the argument in this case, I recognised the undoubted jurisdiction of this Court in all cases of trust, in the sense

in which that word is used in this Court in the ordinary case of trustee and cestui que trust.

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The first question to be determined in this case is, whether the relative positions of the defendants and of the plaintiff are those of trustee and cestui que trust. That this is the first question to be determined is manifest from the reasoning of the Court in all the cases, beginning with *Philips v. Bury* (1) and *Green v. Rutherford* (2) down to and including *The Attorney-General v. Magdalen College* (3). The answer which I feel compelled to give, after examining, I believe, every case that was cited in argument bearing upon it, is, that this is not a case of trust in the sense above explained; but that the master, upon the true construction of the statutes, ought to be considered only as an officer of the cathedral church, appointed for the purpose of performing one of the duties imposed upon the cathedral church by the statutes of the founder. I cannot, in this case, for the purposes of the question I have to determine, distinguish the position of the Master from the position of the master in *The Attorney-General v. Magdalen College*, or from the other cases in the books, in which similar questions have arisen between collegiate bodies and persons holding offices appointed by the founder, but which persons have not been members of the collegiate body. I cannot, upon the construction of the statutes, in this case say, that the master is not one of the "*ministri*" *spoken of in the statutes. But, if the contrary of this could be maintained, I cannot discover a ground for holding that the master is a cestui que trust of the cathedral church, only because he receives a stipend payable out of the common funds of the defendants, which would not equally oblige me to hold that every officer mentioned in the statutes, to whom a livery and a stipend are given, is also a cestui que trust. The case of *The Attorney-General v. Magdalen College* is a direct authority in point; and I am satisfied with following that authority.

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Excluding, then, the case of trust, and assuming also, what I certainly am not disposed to question, (though I give no opinion upon the point), that the removal of Mr. Whiston from the mastership, without hearing him in his defence, was a wrong, the question is, in whom is the jurisdiction to redress that wrong.

If there be a visitor, whose powers are not so circumscribed as to exclude the jurisdiction, I apprehend it is clear, that the jurisdiction

(1) 1 Ld. Ray. 5; S. C., per HOLT,
Ch. J., 2 T. R. 346.

(2) 1 Ves. Sen. 462.

(3) 76 R. R. 148 (10 Beav. 402).

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must be in that visitor, and that his decision upon the point is final. This is so broadly stated in all the cases since *Phillips v. Bury*, that it cannot be necessary that I should refer to authorities in support of it. The case of *Rex v. Bishop of Chester* (1), shows that the rule applies as well to cathedral as to other bodies.

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The jurisdiction of the Court of Queen's Bench may be called in by *mandamus*, to compel the visitor to act; and the jurisdiction of that Court, and in some cases of the Court of Chancery also, may be called in by prohibition, *to restrain the visitor from exceeding his jurisdiction; and where there is no visitor, or the power of the visitor is extinct or suspended, (*Manchester College* case (2)), or is not pleaded in proceedings for a *mandamus* (*Dr. Bentley's* case (3)), the Court of Queen's Bench may be the proper Court to redress the wrong. Attention to these distinctions will reconcile with the law as I have stated it much that was pressed upon me in argument by the plaintiff's counsel.

In this case, I am called upon to decide, that the Court of Chancery has jurisdiction by bill, as matter of course, to try the question in dispute between the plaintiff and the defendants.

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In making the inquiry, whether this proposition is well founded, I need not determine whether the Bishop of Rochester is in this case the visitor; or whether, if he be visitor, he has such an interest in the matter in dispute as to occasion *pro hac vice* a suspension of his visitatorial powers; or whether the right of visitation is in the Crown, to be exercised by the LORD CHANCELLOR upon petition; or whether the plaintiff could, by an application for a prohibition, have protected himself against the continuance of the wrong of which he complains, as in the case of *The Dean of York* (4); or, lastly, whether the Court of Queen's Bench could, by *mandamus*, order the plaintiff to be restored to his office. The only question I have to determine is, whether the Court of Chancery, in the exercise of its ordinary jurisdiction by bill, in a case in which no trust exists, can try the plaintiff's right to the office of schoolmaster, from which the defendants have exercised the power *of excluding him. I am of opinion that this question must be answered in the negative. Excluding trust, I cannot find a single authority which supports the proposition.

I could, on many accounts, have wished for the opportunity of

(1) 1 W. Bl. 22.

(2) 1 Barnard. 52; 1 W. Bl. 22.

(3) *Fortescue*, 202.

(4) 57 R. R. 545 (2 Q. B. 1). See
Wright v. Cattell, 19 L. J. Ch. 527.

explaining more in detail the grounds on which the above opinion has been formed. But, having come to the conclusion I have stated, I have thought it best to give the parties the earliest possible opportunity of having my judgment reviewed, if it should be thought erroneous.

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One other point remains to be noticed. It was said for the plaintiff, that the Court, at all events, would preserve things *in statu quo* until the right should be determined by the proper tribunal. That this was not the object of the bill, as originally framed, is manifest. The object of the bill, at the time the argument commenced, was to obtain the judgment of this Court upon the main question, namely, the plaintiff's right to the office of schoolmaster, notwithstanding the acts complained of. The bill, as amended by consent during the argument, has made it a bill for the execution of the trust, and not a bill for the protection of property *pendente lite*, which is a bill of a special character. But, waiving all objection upon the ground of form, I cannot recognise the general proposition, that, in every case of a dispute arising about a right of office, the Court of Chancery can be called upon, as a matter of course, to prevent the claimant from being displaced until the right shall have been tried; and no special case for the interference of the Court has been made before me. There are numerous cases, even of irreparable mischief, in which the Court has refused to interfere *between adverse claimants, where no ultimate relief could be had in this Court.

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I regret, therefore, being under the necessity of refusing this motion, with costs.

MONYPENNY v. DERING.

(7 Hare, 568—601; S. C. 14 Jur. 1083; 15 Jur. 1050; on app. 2 D. M. & G. 145; 22 L. J. Ch. 313; 17 Jur. 457.)

[AFFIRMED on appeal, as reported in 2 D. M. & G. 45.]

1850.
Feb. 28.
March 1, 2, 5,
6, 8, 9.
April 16.
May 4, 7.

[568]

IN THE COURT OF COMMON PLEAS.

HOARE *v.* SILVERLOCK.

(9 C. B. 20—26; S. C. 19 L. J. C. P. 215.)

1850.
Jan. 11.

[20]

It is a good defence to an action for a libel, that it consists of a fair and impartial (though not *verbatim*) report of a trial in a court of justice; and such defence is admissible under Not guilty, which puts in issue as well the lawfulness of the occasion of the publication, as the tendency of the alleged libel.

THIS was an action upon the case for a libel. The alleged libel consisted of a report of the trial of a case of *Hoare v. Dickson*, also for a libel, which took place at the Croydon Summer Assizes, 1847.

The defendant pleaded Not guilty.

The cause was tried before Wilde, Ch. J., at the sittings at Westminster, after the last Term. The plaintiff proved the publication of the alleged libel, and also that the defendant was the editor of the newspaper in which it appeared.

On the part of the defendant, it was proposed to give in evidence certain letters which had been produced at the trial of the cause of *Hoare v. Dickson* for the purpose of showing that the then defendant, in communicating their contents to a benevolent society of which he was the secretary, had acted *bonâ fide* in the discharge of his duty; and it was further proposed to call witnesses to prove that the report in question, though not a *verbatim* report of what took place at the former trial, was a fair and substantially correct report.

On the part of the plaintiff, it was objected that the evidence so proposed to be given was not admissible,—at all events under the general issue; for that, however necessary the letters might have been for Dickson's justification, the present defendant was not justified in giving them publicity, or in publishing a garbled statement of what passed in Court.

[*21]

The objection was overruled, and the evidence admitted: *and his Lordship, in submitting the case to the jury, told them that they must find for the defendant, if they were satisfied that the publication complained of was no more than a fair and *bonâ fide* report of the trial at Croydon.

The jury accordingly returned a verdict for the defendant.

S. Carter, for the plaintiff, now moved for a new trial, on the ground of misreception of evidence, misdirection, that the

verdict was against evidence, and on the ground of the absence of a material witness :

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The letters produced on the trial of the case of *Hoare v. Dickson* were clearly not admissible in this case.

(WILDE, Ch. J. : They were produced and read for the purpose of showing that the statement of them in the alleged libel was a fair and accurate statement of their purport.

MAULE, J. : They formed a portion of the defendant's evidence that his report was a fair one.)

At all events the matter should have been pleaded specially, in order that the plaintiff might have an opportunity to meet it. * * Many things are privileged when spoken, though defamatory of individuals, the publication of which in a written or printed form, might be made the subject of an indictment or of an action for damages: *Rex v. Creevey* (1); *Rex v. Lord Abingdon* (2); *Rex v. Mary Cartile* (3). It is no part of the duty of a newspaper editor to publish proceedings in a court of justice: he is a mere volunteer. The observations of Lord ELLENBOROUGH, in *Rex v. Fisher* (4), evidently show that there was no disposition in that learned Judge to allow any great latitude in cases of this sort to defendants.

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As to the alleged surprise, the absence of the witness, the affidavit was defective.

MAULE, J. :

Several points have been urged in this case. One is, that the plaintiff was surprised by the absence of a witness upon whose testimony he mainly relied. Surprise is a matter extrinsic to the record and the Judge's notes, and consequently can only be made to appear by affidavit: and here we have no affidavit of surprise, in the sense required by the practice of the Court. That ground, therefore, fails.

The next question is, whether certain evidence which was offered on the part of the defendant, was admissible *under Not guilty. That evidence was of this nature,—having a tendency to show that the alleged libellous matter was published upon an occasion which justified the publication of that which might be injurious to the character of a third person. Now, evidence of that sort, which is

[*23]

(1) 14 R. R. 427 (1 M. & S. 273).

(3) 22 R. R. 338 (3 B. & Ald. 167).

(2) 5 R. R. 733 (1 Esp. 226).

(4) 11 R. R. 799 (2 Camp. 563).

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comprised within the class of privileged communications, has always been held to be admissible under Not guilty. It shows that the publication was not malicious : and Not guilty denies the allegation of malice in the declaration. I do not mean to say that such matter may not also be pleaded specially : it does not follow, that, because it may be given in evidence under Not guilty, it may not be specially pleaded.

The defence relied on, was, that the publication complained of, was a true and *bonâ fide* account of what took place at the trial at Croydon, in 1847. The evidence which was objected to, clearly had a tendency to show that. The question now raised, is, whether, assuming the report to be a fair and *bonâ fide* one, that affords any defence. I think it is impossible at this day to say that a fair account of proceedings in a court of justice, not being *ex parte*, but in the hearing of both sides, is not, generally speaking, a justifiable publication. I do not lay it down as an universal proposition. Matters may appear in a court of justice, that may have so immoral a tendency, or be so injurious to the character of an individual, that their publication could not be tolerated. But, as a general rule, it may be assumed that the publication of a fair account of what passes in a court of justice, not *ex parte*, is justifiable,—unless there be something to take it out of that rule. There is nothing to take this case out of that general rule. The cases cited all apply either to *ex parte* proceedings, or where there is some special reason against the application of the general principle. Upon the whole, I am of opinion that there ought to be no rule.

[24] CRESSWELL, J. concurred.

WILLIAMS, J. :

I also am of opinion that there should be no rule in this case. I understand the question upon the first count to be, whether the LORD CHIEF JUSTICE was right in leaving it to the jury to say whether the matter complained of was a fair account of what took place at the trial at Croydon, and in telling them, that, if they were of opinion that it was, their verdict must be for the defendant. The objection urged, is, first, that, assuming that to be so, it afforded no defence, and, secondly, if it did afford a defence, that it was not admissible under Not guilty. Before the new rules of pleading, it is clear, the defendant had the option of pleading

matter of this sort specially, or of giving it in evidence under Not guilty. And the new rules have made no difference in this respect. In *Cotton v. Browne* (1), it was held, that, in an action for maliciously indicting the plaintiff, without probable cause, the defendant may give evidence of probable cause under Not guilty; and that, if, in addition to the plea of Not guilty, he pleads specially that he had probable cause, the Court will order such plea to be struck out. Lord DENMAN there says: "The injury complained of in this action, is, not merely in the indicting, nor in the indictment being wrongful, but in maliciously indicting, and in doing so without reasonable or probable cause. The plea of Not guilty is sufficient." So, here, Not guilty puts in issue, not merely the publication of the alleged libel, but also the maliciously doing it. Then, does the fact of the matter complained of being a fair and *bonâ fide* account of what took place in a court of justice, afford a defence? Subject to certain qualifications, there is no doubt that it does *afford a defence. The only difficulty I have felt has been in ascertaining the fact. It seems to me that this case is not affected by any of the qualifications adverted to. I assume that the publication complained of was of the whole of the proceedings, not the substance merely; and I also take it for granted that there were no defamatory remarks of the writer's own added to it. I therefore think that the direction was correct, and that there is no foundation for the motion.

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WILDE, Ch. J.:

The rule is moved principally on the ground of misdirection, in the reception and leaving to the jury, under Not guilty, evidence which it is said was inadmissible unless the matter was specially pleaded: and it is further contended that the publication of a fair account of proceedings which take place in a court of justice, is not justifiable, if it reflects upon the character of an individual. It is not suggested that the alleged libel was not a fair account of what took place at the trial of the cause of *Hoare v. Dickson*, at Croydon; nor was there any evidence given to impugn its accuracy. I see no reason, therefore, for finding fault with the conclusion the jury came to. The giving publicity to the proceedings of courts of justice, subject to certain exceptions, is justifiable; and there is nothing in this case to bring it within any of the exceptions. My brother *Shee* opened his defence by stating that the alleged libel

(1) 42 R. R. 407 (3 Ad. & El. 312; 4 Nev. & M. 831).

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was only a fair and *bonâ fide* report of what had taken place on the former trial: and the objection then taken by the plaintiff's counsel, was, not that the fact of the publication being a fair and impartial account of the proceedings, was not an answer to the action, but that the defendant's counsel was not entitled to read the whole of the letters which were in evidence on the former occasion, because the whole were not set out *verbatim* in the alleged libel. The objection was, in *terms, limited to the admissibility of the letters. It is now said that the whole matter of defence was inadmissible, because not specially pleaded. The question is, whether the publication complained of was what the law calls a protected or privileged communication. The inference of malice arising from the publication of libellous matter, is rebutted by showing that it was published upon a lawful occasion. Not guilty puts in issue the tendency of the alleged libel, and also the lawfulness of the occasion upon which it was published. It does not follow that a defence may not be given under Not guilty, because it might also form the subject of a special plea. I think the evidence was admissible on the record as it stood; and, my learned brothers being of opinion that there was no misdirection, I see no ground for disturbing the verdict.

Rule refused.

1850.
Jan. 15.
[26]

BLACKETER AND OTHERS v. GILLETT.

(9 C. B. 26—29; S. C. 19 L. J. C. P. 307; 14 Jur. 814; 1 L. M. & P. 88.)

In case for the disturbance of a ferry, a count alleging that the plaintiffs were entitled to a certain ferry across the Thames, that the defendant conveyed passengers and goods across the river near to the plaintiffs' ferry, and that, by reason thereof, the plaintiffs lost profits, and were prejudiced and disturbed in the possession and profit of their ferry, was held, after verdict for the plaintiffs, to disclose a sufficient cause of action.

THIS was an action upon the case for the disturbance of a ferry.

The first count of the declaration stated that the plaintiffs, before and at the time of the committing of the grievances therein-after mentioned, were, and from thence hitherto had been, and still continued, possessed, to wit, as trustees for the society of Free Watermen of the river Thames, residing at Greenwich, in the county of Kent, called "The Isle of Dogs Ferry Society," of an *antient ferry, called Potter's Ferry, for foot-passengers, and goods belonging to such foot-passengers, across the river Thames, from a certain place in the Isle of Dogs, in the parish of Stepney,

[*27]

in the county of Middlesex, to Greenwich, in the county of Kent; taking for the carriage and conveyance of such passengers, and their goods, as have occasion for the same, over and across such ferry, in any boat or boats kept by or by the authority of the plaintiffs for that purpose, certain reasonable freights or ferryages, to wit, one penny for every person on foot: nevertheless, that the defendant, not being one of the free watermen aforesaid, but well knowing the premises, and contriving to disturb and injure the plaintiffs in the peaceable and lawful enjoyment of the said ferry, theretofore, to wit, on &c., injuriously and unlawfully, and against the will of the plaintiffs, carried and conveyed, in a certain boat of him, the defendant, divers foot-passengers, for hire, over and across the said river Thames, and upon the said part of the same river where the plaintiffs had such ferry as aforesaid, and upon the said ferry of them the plaintiffs, to wit, from the Isle of Dogs as aforesaid to Greenwich aforesaid; and that, by reason thereof, the plaintiffs had lost and been deprived of divers profits and emoluments which would otherwise have arisen and accrued to them from the enjoyment of their ferry, and had been and were greatly prejudiced and disturbed in the possession and profit thereof, and in their right and title thereto.

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The second count stated that the plaintiffs, as trustees as aforesaid, were entitled to the fee-simple and inheritance of the said ferry, and that, whilst the plaintiffs were so entitled as trustees to the fee-simple and inheritance of the said ferry, the defendant conveyed divers passengers and goods over and across the river Thames, near to the said part of the said river where the plaintiffs had such ferry as aforesaid, and near to the said ferry, *to wit, from the Isle of Dogs aforesaid to Greenwich aforesaid; and that, by reason thereof, the plaintiffs lost and were deprived of divers profits and emoluments which would otherwise have arisen and accrued to them from the enjoyment of their said ferry, and were greatly prejudiced and disturbed in the possession and profit thereof, and in their right and title thereto, &c.

[*28]

At the trial, before Wilde, Ch. J., at the sittings in Middlesex, after last Michaelmas Term, a verdict was found for the defendant on the first count, and for the plaintiffs on the second.

Peacock, on behalf of the defendant, now moved to arrest the judgment:

The second count discloses no cause of action. It merely alleges

BLACKETER^{c.} that the plaintiffs were entitled to a certain ferry, and that the
 GILLETT. defendant conveyed passengers and goods across the river near to the plaintiffs' ferry, and that by reason thereof the plaintiffs lost profits and were prejudiced and disturbed in the possession of the ferry: whereas, to give a cause of action, it should have charged the defendant, either with setting up a new ferry, as in *Churchman v. Tunstal* (1), and 2 Rolle's Abridgment, 140, l. 20 (2), cited in Com. Dig. Action upon the Case for a Nuisance (A.), or with having so carried the passengers and goods fraudulently and with intent to evade the plaintiffs' antient ferry, as in *Tripp v. Frank* (3), and *Huzzey v. Field* (4).

(WILLIAMS, J.: Surely this is a very old form of declaring.)

[*29] The old form was, charging the setting up *a new ferry, to the nuisance and disturbance of the antient ferry.

(MAULE, J.: The second count is substantially the same as that in the case of *Tripp v. Frank*. Does not the concluding allegation, that the plaintiffs "were greatly prejudiced and disturbed in the possession and profit of their antient ferry, and in their right and title thereto," make the count good? The plaintiffs, to entitle them to a verdict on this count, must have proved, not merely that the defendant carried over some person near to their ferry, but that the act complained of was a disturbance of their right.)

It is not enough to say that the defendant disturbed the plaintiffs' ferry, without saying how.

(MAULE, J.: Probably not, on special demurrer: but the question is, whether it is not sufficient after verdict.)

The thing relied on as a disturbance of the plaintiffs' right, must be something that is equivalent to a setting up a new ferry.

MAULE, J.:

Carrying passengers and goods across the river in the manner

(1) Hardres, 162.

(2) Translated, 16 Vin. Abr. 26, pl. 4, and citing 22 Hen. VI. 14 b (M. 22 Hen. VI. fo. 14, pl. 23, *Prior of St. Nede v. Weston*). That was an action for erecting a horse mill, to the injury of three mills of the prior, in which

the ferry question was discussed *obiter* between PASTON, J. and NEWTON, Ch. J.

(3) 2 R. R. 495 (4 T. B. 666).

(4) 41 R. R. 755 (2 Cr. M. & R. 432; 5 Tyr. 855). And see *Peter v. Kendal*, 30 R. R. 504 (6 B. & C. 703).

here alleged, may or may not be a disturbance of the plaintiffs' ferry. The count charges a disturbance; and the jury have found it.

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It is only in a tolerably clear case that the Court will grant a rule to arrest the judgment. We think this is a case in which the defendant ought to be left to his writ of error, if so advised.

Rule refused (1).

NAVONE v. HADDON AND ANOTHER.

(9 C. B. 30—45; S. C. 19 L. J. C. P. 161.)

1850.
Jan. 25.

[30]

Upon a policy on goods free from particular average, no damage short of the absolute destruction of the thing insured, will amount to a total loss.

The plaintiff insured certain bales of waste-silk, from Leghorn to Liverpool, with the usual memorandum declaring silk free from average, unless general, or the ship should be stranded. The vessel, being compelled by stress of weather to put into Gibraltar, was there repaired, her cargo being necessarily unloaded. Some of the bales of silk were found to be considerably damaged by sea-water, and were consequently sold at Gibraltar, by the master, in the exercise of what the jury found to be a reasonable discretion, and such as a prudent owner uninsured would have exercised. But the silk might at a reasonable or moderate expense have been put in a condition to be brought home by another vessel: and it was in fact brought to England, and sold as silk, though in a very deteriorated state: Held, that this was not a total loss; and, consequently, that the assured was not entitled to recover.

COVENANT, against two of the directors of the Neptune Marine Insurance Company.

The plaintiff declared upon a policy of insurance effected by him with the Company upon eighty-one bales of waste-silk, valued at 2,245*l.*, warranted free of particular average, unless the ship should be stranded. The voyage was, in ship or ships at and from Genoa to Leghorn, and at and from thence per ship or ships to Liverpool. The declaration averred that forty-four out of the eighty-one bales of silk insured, were shipped at Genoa, and transhipped at Leghorn on board the *Wanderer*, on the voyage mentioned in the policy; that one Pierre Borella was interested in the silk; and that there was a total loss, by perils of the seas, of twenty-three of those bales, and a general average as to the remainder of the forty-four bales.

The defendants traversed the total loss averred, and paid into Court a sum sufficient to cover the general average loss.

The cause was tried before Williams, J., at the sittings in London after Trinity Term, 1848, when a verdict was found for the plaintiff,

(1) See *Blissett v. Hart*, Willes, 508; Bull. N. P. 76.

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with 620*l.* damages, *subject to the opinion of the Court on the following case :

The ship *Wanderer*, with forty-four of the eighty-one bales of silk mentioned in the policy, and a general cargo consisting of Indian corn, flour, and other articles, sailed from Leghorn, on the voyage insured against, on the 15th of April, 1846. From the 17th, she suffered bad weather, the effect of which was detailed in the evidence: the water increased in the hold, and, notwithstanding incessant working at the pumps, she, on the 23rd, was making twelve inches of water per hour. After throwing overboard a part of the Indian corn, it became necessary, from the state of the ship, to put into Gibraltar, which was done on the 11th of May following. At Gibraltar, several surveys, by direction of the captain, were made of the ship; and it was found to be necessary to unload her cargo. This was done, and the forty-four bales of silk were taken out and examined. Some were found to have sustained no damage; others, about eleven bales, were damaged by the sea-water (by reason of the bad weather already mentioned), but were not considered by the surveyors to be incapable of being carried on. These undamaged and partially damaged bales were therefore re-shipped on board the *Wanderer*, when she was repaired, and were conveyed to Liverpool: and, as to those, no question arises. As to the remaining (twenty-three) bales, both parties gave evidence of witnesses at Gibraltar, who had, by direction of the master, surveyed them, and of witnesses in England chiefly engaged in the silk-trade. It appeared, that, when examined, these twenty-three bales were found to be saturated with sea-water, greatly heated, partly in a state of putridity, and to emit an intolerable stench, which infected the atmosphere for some distance. As to the cause of this stench, the witnesses differed in opinion, one ascribing it to the excrement of the *silk-worm, which, in his judgment, remained in the article called waste-silk, and which, when wetted by the sea-water, would cause putrefaction in the silk; others, who were of opinion that the excrement of the worm did not necessarily remain in the waste-silk, thought the action of sea-water on waste-silk was alone sufficient to account for the stench.

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The witnesses for the plaintiff who had examined the silk at Gibraltar, were of opinion, that, if it had been re-shipped, it would have arrived in England spoiled and perished, and wholly valueless, and have destroyed some other perishable part of the cargo of the *Wanderer*; that there was no part of any one of those twenty-three bales which could have been properly re-shipped; and that no

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endeavour to prepare the silk for re-shipment would have been successful.

The witnesses for the defendants examined at Gibraltar were persons who had there bought six of the twenty-three bales, at the sale hereafter mentioned. The purchaser of two of them described them as wholly damaged and spoiled, except about sixty-eight or seventy pounds in the centre of one of them, which were very slightly damaged, the whole weight of that bale being about seven hundred and forty pounds, which sixty or seventy pounds he thought would have been serviceable for the purposes to which waste-silk is usually applied. The purchaser of two of the others had them shipped to England, and sold, he losing about forty dollars by the transaction. The purchaser of one of the others had not been able to re-sell it: it was damaged to the extent of one-third in bulk; the remainder was dry and sound. The purchaser of the rest had sent it to England at a fixed price; but it had not been sold. Of these witnesses, some described the other bales thus: Some of the bales were completely and entirely damaged and spoiled; others had a portion dry and *sound, some to the extent of a third or fourth, others in a much less proportion.

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The English witnesses for the defendants proved, that three of the above bales, and another bought by a purchaser who was not examined, were sold in England as silk; and that, in their opinion, silk in the state in which the above twenty-three bales were described to be, could have been sent to England by steamers, without being dried, and could there have been washed and so dealt with as to retain the character of silk.

The twenty-three bales were sold by the master, under the advice of the surveyors who had examined them, as before mentioned.

The examination of the ship was on the 16th of May, the day after the ship's arrival. The surveyors recommended the Indian corn to be discharged.

The second examination was on the 19th, when they recommended that the whole of the perishable and light part of the cargo should be discharged, and the vessel further examined. The silk was accordingly conveyed on board a floating store in the bay, and examined on the 23rd of May, when the surveyors recommended an immediate sale of the twenty-three bales. Notice of sale by auction was given; and the sale took place, by direction of the master, on the 27th and 28th of May.

The *Wanderer* was under repair until the 30th of June. On the

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2nd of July she sailed for (1) Gibraltar; and she arrived at Liverpool on the 20th of July.

Mr. Borella, the person interested in the goods, resided at Manchester. He received no information as to the ship, until a few days before her arrival at Liverpool, when he received information that she had put into Gibraltar. On the 27th of July, he received information of the fact of the damage which had been sustained by the silk, and of the fact of the sale, and the account-sales, in the same letter.

[34] The plaintiff had no agent at Gibraltar.

The defendants' counsel contended at the trial; first, that this was an insurance upon the whole eighty-one bales; and that, as all but the twenty-three in question had arrived at their place of destination, there could be no total loss within the meaning of the policy. The learned Judge overruled this objection, and directed the jury that the insurance was to be taken as upon each bale.

Secondly, that, at all events, if the silk could have been put into a state in which it could have been conveyed to England in any other ship, it was the duty of the assured to incur the expense of putting it into such state, and of so conveying it.

The learned Judge left to the jury the questions following, to which they returned the answers following:

First, was the damage to the goods such as to involve total destruction in specie, either actual or inevitable? Answer, that some portion (but what portion they could not say) of each bale would have arrived home without losing its character of silk.

Secondly, would a prudent owner uninsured have adopted the course which, in fact, was adopted as to these bales? Answer, yes, he would.

Thirdly, did the damage to the goods render them such an intolerable nuisance to the rest of the cargo of the *Wanderer*, that it was reasonably justifiable in the master to refuse to carry them any further in that ship? Answer, that the damage to the goods rendered them such a nuisance to the ship's crew (but not injurious to the cargo) that it was reasonably justifiable to decline to carry them any further in the *Wanderer*.

[*35] Fourthly, was it possible to examine the goods, and, by a reasonable expense, or moderate expense, at Gibraltar, to send them home, so that they would still *bear the character of silk, by some other vessel? Answer, yes, by some other vessel.

The question for the opinion of the Court, is, whether the

(1) *Sic*: an obvious error for "from."

plaintiff was entitled to recover as for a total loss in respect of any, and if any, of how many, of the bales. If he was, the verdict is to stand for such sum as the Court shall direct. If he was not, a verdict is to be entered for the defendants.

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Barstow, for the plaintiff (1) :

Upon the findings of the jury, as set out in the case, the plaintiff is clearly entitled to recover in respect of the whole twenty-three bales. It appears that these bales were in a state of putrefaction, and therefore the master was justified, by his duty in regard to the health of the crew, in declining to bring them home. It will probably be contended on the other side, that it was the duty of the assured to incur the expense of putting the silk in a state to be brought to England. But it is found as a fact, that he had no agent at Gibraltar, and that the master, in the course he adopted, acted *bonâ fide* for the benefit of all concerned. In *Cocking v. Fraser* (2), which was an action for a total loss of a cargo of fish, upon a voyage from St. John's, Newfoundland, to a port in Portugal, the policy containing the usual memorandum declaring fish, &c., free from average, *unless general, or the ship were stranded, the cargo remaining in specie, though by sea-damage rendered of no value, the underwriters were held not liable, there having been no stranding: and Lord MANSFIELD said: "This clause, relative to fruit and fish, is now a very old one in policies of insurance. The insurer undertakes for all losses except particular damage, unless the ship be stranded: he engages against a total loss. What is a total loss? The total loss of the thing insured, is, the absolute destruction of it, by the wreck of the ship. The fish may all come to port; though, from the nature of the commodity, it may be damaged, it may be stinking: still, as the commodity specifically remains, the underwriter is discharged." But Lord KENYON, in *Burnett v. Kensington* (3), said "that he could not

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(1) The point marked for argument on the part of the plaintiff, was as follows: "The plaintiff will contend, that, under the circumstances disclosed by the special case, he is entitled to recover as for a total loss of the twenty-three bales of silk in question."

For the defendants: "The defendants will contend, that, as part of the subject-matter insured arrived at its place of destination uninjured, there

was no total loss within the meaning of the policy; and that, if the uninjured part could have been put into a state in which it could have been conveyed to England, it was the duty of the insured to incur the expense of putting it into such a state, and of so conveying it."

(2) Park, Ins. 8th ed. 247.

(3) 4 R. R. 424 (7 T. R. 210).

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subscribe to the *dictum* of Lord MANSFIELD, in *Cocking v. Fraser*, that, if the commodity specifically remain, the underwriter is discharged." *Cocking v. Fraser* was also considered in *Dyson v. Rowcroft* (1) where the COURT adopted the doubt thrown upon the case of *Cocking v. Fraser*, in *Burnett v. Kensington*. * * *Cologan v. The London Assurance Company* (2) is also in point. * * *

[37] (CRESSWELL, J.: The form of the policy, excluding average loss, places you in this difficulty. Can it be said that this silk was totally lost when at Gibraltar? It is another thing to say it was not worth the expense of bringing home.)

[*33] The case certainly *states that it existed in specie as silk.

(MAULE, J.: Not only did it exist in specie, but it was of some value, it was sold as silk. Can it, then, be said to have been totally lost?)

If its condition was such as to justify the master in selling it, it was totally lost to the owner. In *Gernon v. The Royal Exchange Assurance Company* (3), it was expressly held, that, if a cargo be so much damaged that it is not fit to be sent forward to a market, the assured may abandon, as a total loss.

(MAULE, J.: That was not the case of an assurance free from average.)

If the cargo is so damaged by a peril insured against, that no prudent master would bring it home, the loss is total.

(WILDE, Ch. J.: Is the cargo unfit to proceed, when a little expense may restore it?

CRESSWELL, J.: What amount of injury to the silk would have justified the assured in treating it as a total loss? Would 80 or 90 per cent.?)

Probably not.

(CRESSWELL, J.: Neither would 99 per cent.: to charge the underwriters upon such a policy as this, there must be an actual total loss. *Davy v. Milford* (4) is very much like this case: there,

(1) 7 R. R. 809 (3 Bos. & P. 474).

(4) 15 East, 559; see 15 R. R.

(2) 17 R. R. 390 (5 M. & S. 447).

279, n.; 52 R. R. 849, n.

(3) 16 R. R. 630 (6 Taunt. 383).

the policy was effected on flax, valued at so much, and warranted free of particular average; and it was held, that, the vessel being wrecked, and the assured not having abandoned, but having laboured to save the cargo, and having in fact saved a part (one sixteenth), though much damaged, they were entitled to recover as for a total loss of that part which was in fact totally lost, but not for the rest, which was saved to them in specie, though deteriorated.)

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Parry v. Aberdeen (1) shows that that is not the true test. There, a vessel, having goods on board upon which an insurance was effected, but which were warranted free from average unless general, was placed in so much *danger by perils of the sea, that the crew deserted her in order to save their lives; and the owners of the goods, upon receiving intelligence of this, gave notice of abandonment. A few days afterwards, the vessel was found by some fishermen, and towed into port, and repaired; but the goods (which were of a perishable nature) had been so much injured by the salt water, that they would not have been worth any thing if forwarded to the place of destination. It was held that the assured, under the circumstances, were entitled to recover for a total loss. All the authorities underwent discussion in *Roux v. Salvador* (2), where the judgment of this Court was affirmed on error. [He cited *Stevens on Average* (3).]

[*39]

(CRESSWELL, J.: The author is there merely giving the mode of stating an average loss.)

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The other view of the case is this: The assured, having no agent at Gibraltar, clearly was not bound to incur expense for the purpose of putting the silk in a condition to be re-shipped. The master, under the circumstances, was the agent of the underwriter. In Mr. Justice Story's edition of *Abbott on Shipping* (4), it is said that, if the cargo is of a perishable nature, "and there be no time or opportunity to consult the merchant, the master ought either to tranship or sell it, *according as the one or the other will be most beneficial to the merchant." And, in a note thereto, reference is made to a case of *Jordan v. Warren Insurance Company* (5), where it was held, that, when a cargo is so much injured that it will

[*42]

(1) 33 R. R. 221 (9 B. & C. 411;
4 Man. & Ry. 343).

(3) 5th ed. p. 80.

(4) 5th American edit. p. 447.

(2) 43 R. R. 638 (3 Bing. N. C. 266;
4 Scott, 1).

(5) Story, C. C. 342.

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endanger the safety of the ship and cargo, or it will become utterly worthless, it is the duty of the master to land and sell the cargo at the place where the necessity arises, even though it might have been carried to the port of destination, and there landed. That is exactly this case.

Martin (with whom was *Greenwood*), for the defendants, was not called upon.

WILDE, Ch. J. :

This is an action upon a policy of insurance on certain bales of waste-silk, valued at a certain sum, and warranted free of particular average, unless the ship should be stranded. The facts found are these : That the vessel, with the silk on board, set sail on the voyage insured ; that she encountered bad weather, and was compelled to put into Gibraltar ; that, it being found necessary to unload the vessel, the silk was taken out ; that, upon examination, certain of the bales were found to have sustained no damage, and others so little as not to render them incapable of being re-shipped and carried to their destination ; and that certain other of the bales were found to be so much damaged by sea-water, that it was thought advisable to sell them at Gibraltar ; but that no one of the bales was so damaged as to make the whole contents useless for any mercantile purpose. There was, therefore, no entire loss of any one bale ; consequently, the facts stated, as it seems to me, decide the case. It is a case of average, and not of total, loss.

[*43] It is found, that, by *incurring a reasonable expense, the silk might have been sent on by another vessel to its destination, though in a deteriorated state, still bearing the character of silk. What, then, is there to turn this into a total loss ? From the nature of the article, and its being peculiarly susceptible of injury from various causes, the underwriter says he will not be liable to average loss on silk, except in a given event ; and the premium is calculated with reference to his liability for a total loss only. Now, the facts found, are, that the silk in question was only partially damaged, that no one package was so injured as in the result to lead to its entire destruction, but that the whole might have been sent forward, as silk, in a reasonable time, and at a reasonable expense. There is, therefore, no pretence whatever for converting this into a case of total loss. The cases of *Anderson v. Wallis* (1),

(1) 14 R. R. 642 (3 Camp. 440 ; 2 M. & S. 240).

and *Hunt v. The Royal Exchange Assurance Company* (1) have settled that any delay within reasonable limits, would not suffice to make that a total loss which was not in its nature an entire destruction of the subject-matter of insurance. There was no unreasonable delay here; for, it appears that the *Wanderer* put into Gibraltar on the 11th of May, and was repaired and ready for sea on the 30th of June. To sustain the claim for a total loss, the case should have found circumstances which would have prevented the assured from having the benefit of the voyage. None such are found here: on the contrary, it is found, as before observed, that a reasonable expense would have enabled the master, within a reasonable time, to forward the silk to its destination. The facts bring the case within the authorities, which cannot be disputed, and which clearly entitle the defendants to our judgment. The only ground upon which *it was sought to distinguish the case from those which are adverse to the plaintiff's view, was, that it is found here that the assured had no agent at Gibraltar. But, when it is found that the goods might have been forwarded at a reasonable cost, and within a reasonable time, to their destination, I think that argument fails.

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MAULE, J. :

I also am of opinion that our judgment must be for the defendants. *Roux v. Salvador* was relied on for the plaintiff: but the decision there, proceeded upon the fact that the hides were damaged to such an extent that they could not have been forwarded to their destination in such a state as to retain the character of hides. The loss, therefore, clearly was total. Here, the silk was very much damaged, but not to such an extent as to prevent its being carried, as silk, to its destination. A partial loss cannot be turned into a total loss, because those who have the control over the goods, may act prudently in selling them at an intermediate port, rather than incur the expense of cleansing and re-shipping them. It may be that a prudent owner uninsured would not have thought it worth his while to carry these goods further, but would have left them behind: still, that alone would not make the loss total.

CRESSWELL, J. :

I am entirely of the same opinion. Lord MANSFIELD, in the first case which I believe is to be found in the books upon this subject,

(1) 17 R. R. 264 (5 M. & S. 47).

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expressed an opinion, that, upon a policy in this form, there could be no total loss, where the goods still physically existed. Some exceptions have, undoubtedly, been engrafted upon the rule so unequivocally laid down. Still, if the goods are in such a state that they are capable of being forwarded, however they may be deteriorated, the loss is not a total loss. The American Courts seem to adhere *to the rule laid down in *Cocking v. Fraser*. Whether that is the better rule or not, it is not worth while now to consider; for, there clearly has been no total loss here, even according to the more liberal principle adopted by the recent English decisions.

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WILDE, Ch. J. :

My brother WILLIAMS, who was present when the argument took place, concurs in the decision we have pronounced.

Judgment for the defendants.

1850.
Jan. 14.

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LYSAGHT v. BRYANT.

(9 C. B. 46—54; S. C. 19 L. J. C. P. 160; 2 Car. & Kir. 1016.)

A. and B. carried on business in partnership. The firm being indebted to C., A. (who acted as C.'s agent), with the concurrence of B., indorsed a bill of exchange in the name of the firm, and placed it amongst the securities which he held for C., but no communication of the fact was made to C.: Held, a good indorsement by A. and B., to C.

The holder of a bill of exchange may, in an action against the drawer, avail himself of a notice of dishonour given in due time by any party to the bill, who, at the time of giving the notice, was under liability to him (1).

ASSUMPSIT. The first count of the declaration stated that the defendant, on the 7th of May, 1847, made his bill of exchange in writing, and directed the same to one Matthews, and thereby required the said Matthews to pay to his, the defendant's, order, the sum of 800*l.*, six months after the date thereof; that the defendant then indorsed the said bill to one James Lysaght and one William Smithett, who then indorsed the same to the plaintiff; and that Matthews did not pay the same, although duly presented, of which the defendant had notice, &c.

Pleas, amongst others, first, that the defendant had no notice of the dishonour of the bill by the drawee; secondly, that Lysaght and Smithett, did not indorse the bill, in manner and form as in the first count alleged.

(1) See sects. 21 and 49 of the Bills of Exchange Act, 1882.—J. G. P.

The cause was tried before Wilde, Ch. J., at the sittings in London after the last Term. It appeared that James Lysaght and William Smithett had carried on business in partnership together, as East India merchants; and that the firm being indebted to the plaintiff, Admiral Lysaght, the father of James Lysaght, in the sum of 6,000*l.*, James Lysaght, in July or August, 1847, with Smithett's concurrence, and in his presence, indorsed the bill in question to the plaintiff. To prove this, James Lysaght was called. He stated, that, after he had so indorsed the bill, he held it as his father's agent, keeping it either in a separate part of the cash-box, or at his chambers in Regent Street. It did not appear *that the fact of the indorsement had been communicated by the son to the father.

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The bill was duly presented on the 10th of November, when it became due, but was not paid; whereupon Lysaght and Smithett, on the 11th of November, gave the defendant the following notice of dishonour:

"SIR,—We beg to inform you that your draft on Mr. Matthews, dated the 7th of May last, at six months' date, for 800*l.*, was duly presented, at &c., for payment, when the answer given to the notary was, 'no effects.' The bill is now in our possession, and we require you to take it up immediately. Meanwhile, we request you to take notice we do not release you from responsibility by holding it over.

"Yours, &c.

"LYSAGHT, SMITHETT & Co."

On the part of the defendant, it was proved that it was the custom of notaries in London to keep copies of all bills that pass through their hands, with all indorsements thereon, and that this practice was observed at the office of Duff, the notary by whom the bill was presented. And the notary's book was produced, and the clerk who entered the bill therein, called: and from these it appeared, assuming the entry to have been correctly made, that there was no indorsement by Lysaght and Smithett upon the bill at the time of its presentment.

It was then submitted that the notice of dishonour was insufficient.

The LORD CHIEF JUSTICE reserving that point, left it to the jury to say whether the indorsement by Lysaght and Smithett was made before or after the bill arrived at maturity.

A verdict having been found for the plaintiff,

Byles, Serjt., pursuant to the leave reserved to him at the trial,

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moved for a rule *nisi* to enter the *verdict for the defendant, or for a new trial on the ground that the verdict was against evidence. Assuming that the jury were justified in giving credit to the witness James Lysaght, rather than to the entry in the notary's book, there was no proof of the indorsement, to constitute which there must be something more than mere writing on the back of the instrument: there must be a delivery, actual or constructive, to the indorsee.

(WILDE, Ch. J.: There was evidence that James Lysaght acted as his father's agent; and he swore that he had appropriated and set apart this bill, after it had been indorsed, for his father.)

Assuming, then, that Admiral Lysaght, was the holder of the bill at the time it became due, the notice of dishonour given by Lysaght and Smithett, did not enure as a notice from him. The object of the notice of dishonour is twofold: not only must it show that the bill has been presented and refused payment, but it must also contain a notification of the fact that the party who gives the notice, looks to the party who receives it, for payment of the amount. Three cases have occurred that are somewhat like the present. In *Woodthorpe v. Lawes* (1), a bill of exchange indorsed in blank was left by the indorsee at the office of R., an attorney, to be presented by him. The bill being dishonoured, R. sent the following notice to the drawer: "A bill drawn by you upon, and accepted by, Mr. J. W., for 31*l.* 3*s.*, due yesterday, is dishonoured and unpaid; and I am desired to give you notice thereof, and to request that the same may be immediately taken up:" and this was held to be a sufficient notice, although the attorney did not state on whose behalf he applied, or where the bill was lying. The expression, however, "I am desired to give you *notice," was equivalent to saying that the person giving the notice did so as agent for the holder. In *Chapman v. Keane* (2), it was held that the holder of a bill is entitled to avail himself of notice of dishonour given by any party to the bill; and, therefore, that an indorsee, who has indorsed over, and is not the holder at the time of the maturity and dishonour, may give notice at such time to an earlier party, and, upon afterwards taking up the bill, and suing such party, may avail himself of such notice. In *Harrison v. Ruscoe* (3), a bill of exchange was drawn by A., indorsed by him to B., and

[*49]

(1) 2 M. & W. 109.

4 Nev. & M. 607).

(2) 42 R. R. 363 (3 Ad. & El. 193;

(3) 71 R. R. 640 (15 M. & W. 231).

by B. to C., in whose hands it was dishonoured. C.'s attorney gave notice of dishonour in due time to A., but stated therein, by mistake, that he was directed by B. (from whom he had no authority,) to apply for payment of the bill: and it was held that the notice of dishonour was sufficient, notwithstanding the misrepresentation, the only effect of which was, to give A. every defence against C. that he could have had if the notice had really been given by B. That case is the converse of this,—the notice being given by the party coming after the plaintiff on the bill.

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(WILLIAMS, J.: PARKE, B., in that case says: "Since the case of *Chapman v. Keane*, it must be considered as perfectly settled, that a notice of dishonour need not be given by the holder, but that he may avail himself of notice given, in due time, by any party to the bill. The decision in that case is referred to and adopted by Chancellor Kent (1), and Mr. Justice Story on Bills of Exchange (2). The former states the rule to be, that the notice may be given by any one who is a party to the bill: the latter states it more fully, and says that the notice will be sufficient, although not given by the holder or his *agent, if it comes from some person who holds the bill when it is dishonoured, or is a party to the bill, or who would, on the same being returned to him, and after payment, be entitled to require reimbursement thereof.")

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The party who avails himself of a notice so given, must stand in the same position as the person whose notice he avails himself of.

(MAULE, J.: Has this defendant any defence against Lysaght and Smithett? A notice by an intermediate party, is a good notice by the plaintiff, but it lets in a set-off or other defence which the defendant would have had against the person who actually gives the notice.)

The defendant has not had such a notice as to entitle the present plaintiff to sue him upon the bill.

(CRESSWELL, J.: I find the rule thus laid down in Byles on Bills (3): "The object of notice is two-fold; first, to apprise the party to whom it is addressed, of the dishonour; and, secondly,

(1) 3 Kent's Comm. p. 100.
(2) Sect. 304.

(3) 5th ed. p. 214.

LYSAGHT case, if the jury were right in the conclusion to which they came:
 v. and I am not prepared to say that they were wrong.
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WILDE, Ch. J. :

I certainly was not dissatisfied with the verdict. Lysaght the younger swore positively that the security in question was appropriated by him, with Smithett's assent, in part discharge of the debt due to the plaintiff. He was very strictly cross-examined as to the period at which the indorsement took place: he distinctly swore that it was before the bill became due: he believed it was in July or August. If Lysaght and Smithett intended to act honestly, they were bound to make the indorsement; and there is no reason for supposing that they did not, or that James Lysaght stated that which was untrue. On the other hand, there can be as little doubt that the notary's clerk meant correctly to copy the indorsements into the book. It was for the jury to decide between the conflicting statements. As *to the notice of dishonour, the case seems to fall within the authorities. The facts show that Lysaght and Smithett had due notice of the dishonour of the bill, one of them having caused it to be presented, and having had it returned to him. A notice, therefore, by Lysaght and Smithett, then being under a liability to the present plaintiff, according to the authorities, enures as a notice to the defendant.

Rule refused.

1850.
 Jan. 25.

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(9 C. B. 62—93; S. C. 19 L. J. C. P. 217.)

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In *quare impedit*, the Ordinary cannot counterplead the patron's title, by setting up title in the Queen, by lapse.

Where the incumbent of a parish church presents himself to a district church within the parish, created under the Church Building Acts, 1818, 1819 (58 Geo. III. c. 45, and 59 Geo. III. c. 134), the annual value of the two livings exceeding 1,000*l.*, the parish church becomes, under the provisions of the Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 4, 11, *ipso facto* void.

QUARE IMPEDIT. The declaration stated, that whereas John George Storie, the plaintiff, theretofore, and before and until and after the making of the representation and Order in Council, and the effecting of the division and assignment of the district parish of St. Mary Magdalen, Peckham, as thereafter respectively mentioned, to wit, on the 16th of April, 1842, and from thence continually until and upon and after the 28th of October, 1843, was seised of the advowson of the vicarage of the church of

St. Giles, in the parish of Camberwell, in gross, as of fee and right : And also, before the making of the said representation, and the Order in Council, and the effecting of the division and assignment thereafter respectively mentioned, to wit, on the 1st of May, 1842, her Majesty's Commissioners for building new churches, duly caused the said church of *St. Mary Magdalen to be built, to wit, under and in pursuance of the provisions of the Act of Parliament made and passed in the fifty-eighth year of the reign of his late Majesty King George the Third for building and promoting the building of additional churches in populous parishes, and of the Act of Parliament made and passed in the fifty-ninth year of the reign of his said late Majesty, to amend and render more effectual the said first-mentioned Act : And the said last-mentioned church was then, to wit, on the day and year last aforesaid, duly consecrated, to wit, by the said Charles Richard, as, and being, such Bishop as aforesaid : And thereupon, and whilst the said John George Storie was so seised as aforesaid, to wit, on the 1st of June, 1842, aforesaid, the said Commissioners, having taken into consideration all the circumstances attending the said parish of St. Giles, Camberwell, were of opinion that it was expedient (amongst other things) that an ecclesiastical district should, to wit, under the provisions of the said first-mentioned Act, be divided from the parish of St. Giles, Camberwell, aforesaid, and assigned to the said church of St. Mary Magdalen, for the purposes in the said first-mentioned Act in that behalf mentioned ; and did then, to wit, on the day and year last aforesaid, according to the statute in such case made and provided, represent such opinion to her Majesty, the Queen, in Council ; and did state, in such representation, the bounds by which such district was proposed to be described : And the said Bishop did then, to wit, on the day and year last aforesaid, consent to the said division and assignment, and did signify such consent under his hand and seal, to wit, at Camberwell aforesaid, in the county aforesaid : And afterwards, to wit, on the 18th of June, 1842, aforesaid, at the Court at Buckingham Palace, our sovereign lady the Queen, having taken the said representation into consideration, was pleased, by and *with the advice of her Privy Council, to approve thereof, and to order and direct that the said division and assignment should be made and effected agreeably to the provisions of the statute in such case made and provided : And thereby, then, to wit, on the day and year last aforesaid, the said division and assignment respectively

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became and were made and effected under and by virtue of the said statutes, to wit, at Camberwell aforesaid, in the county aforesaid : And afterwards, to wit, on the day and year last aforesaid, the said district was duly ascertained and marked out by described bounds, and the description of such bounds was duly inrolled and registered, and notice thereof was duly given, as by the said first-mentioned Act required : And thereupon, by force of the said statutes, to wit, on the day and year last aforesaid, such district became and was called " The district parish of St. Mary Magdalen, Peckham " (being the name given thereto in the instrument so inrolled as aforesaid), and became and was a separate and distinct district parish ; and the said church of St. Mary Magdalen, so assigned to such district (being duly consecrated for that purpose,) became and was the district parish church of the said district parish of St. Mary Magdalen, Peckham, for all ecclesiastical purposes, in manner as in and by the said Acts respectively provided ; and the said last-mentioned church (the same having been built and appropriated as and in the manner aforesaid,) became and was a perpetual curacy, and became, and was considered in law as, a distinct benefice and church, that is to say, a benefice presentative, so far as by the said Acts in that behalf provided and enacted, to wit, at Camberwell aforesaid, in the county aforesaid : And the said John George Storie, being, during all the time aforesaid, and remaining, so seised of the advowson of the vicarage of the said church of the parish of St. Giles, Camberwell, as aforesaid (out of which the said district of St. Mary *Magdalen, Peckham, had been and was so taken as aforesaid), thereby then became seised, as of fee and right, of the perpetual right of presentation or nomination and appointment of the spiritual person to be the incumbent of, or to serve, the said district church of St. Mary Magdalen, Peckham, in manner as in the said Acts respectively in that behalf provided, that is to say, upon and after the death or other avoidance of the said Rev. John George Storie, clerk, the then incumbent of the said parish of St. Giles, Camberwell, or upon and after the voluntary resignation of the said district church by the said incumbent of the said last-mentioned parish, to wit, at Camberwell aforesaid, in the county aforesaid : And the said John George Storie being and remaining so seised of the said advowson of the vicarage of the church of St. Giles, Camberwell, and of the said right of presentation or nomination and appointment to the said district church of St. Mary Magdalen, Peckham, as respectively aforesaid, afterwards, to wit, on the 20th of May, 1843, the said church of

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St. Giles, Camberwell, duly became and was vacant, to wit, by the resignation of the said John George Storie, to wit, at Camberwell aforesaid, in the county aforesaid, which said resignation was then and there duly accepted by the said Charles Richard, as, and being, such Bishop as aforesaid: And thereupon the said John George Storie, being and remaining so seised as respectively aforesaid, to wit, on the 28th of October, 1848, aforesaid, at the parish of St. Giles, Camberwell, aforesaid, in the county aforesaid, presented to the last-mentioned church, being so vacant as aforesaid, or prayed the said Charles Richard, as, and being, such Bishop as aforesaid, to admit himself, the said John George Storie, clerk, who, on his own presentation or prayer as aforesaid, was duly admitted, instituted, and inducted into the same, in the time of *peace, in the time of our sovereign lady Victoria, the now Queen of Great Britain, to wit, on the day and year last aforesaid: And, afterwards, and whilst the said John George Storie was and remained so seised of the said right of presentation or nomination and appointment to the said district church of St. Mary Magdalen, Peckham, the Rev. James Sydney Darvell, clerk, which said James Sydney Darvell had been and was, at the time of the consecration of the said district church, and the division and assignment of the said district parish as respectively aforesaid, appointed by the then incumbent of the said church of St. Giles, Camberwell, to wit, the said John George Storie, clerk, and licensed, to wit, by the said Charles Richard, as, and being, such Bishop as aforesaid, as, and to be, the stipendiary curate to serve the said district church, resigned the stipendiary curacy of the said district church of St. Mary Magdalen, Peckham, to wit, at Camberwell aforesaid, in the county aforesaid; which said last-mentioned resignation was then and there accepted by the said Charles Richard, as, and being, such Bishop as aforesaid: And thereupon, to wit, on the day and year last aforesaid, and whilst the said John George Storie was and remained so seised of the said right of presentation or nomination and appointment to the said district church as aforesaid, to wit, on the day and year last aforesaid, the said district church of St. Mary Magdalen, Peckham, had become and was vacant, no spiritual person having ever theretofore been instituted or licensed as the perpetual curate of the said district church, or presented, nominated, or appointed to the perpetual curacy of the said district church: And that it then and there belonged, and now belongs to the said John George Storie to present or nominate and appoint a fit spiritual person to the said district

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church, so being vacant as aforesaid; but that the said Bishop would not permit him so to do, and unjustly hindered him, *wherefore he, the said John George Storie, said he was injured, &c.

Second plea, that the said John George Storie ought not to have or maintain his said action against the said Bishop, because he said, that, after the passing of an Act of Parliament passed in the session of Parliament holden in the first and second years of the reign of her Majesty Queen Victoria, intituled "An Act to abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy," and after the building and consecration of the said church of St. Mary Magdalen, and the making of the representation and Order in Council, and the effecting of the division and assignment of the said district parish of St. Mary Magdalen, as in the declaration respectively mentioned, to wit, on the 1st of November, 1843, the said church of St. Giles in the declaration mentioned, became vacant, to wit, by the resignation thereof then and there made by the said John George Storie to, and accepted by, the said Bishop, as Ordinary thereof: that the said John George Storie was thereupon then and there admitted, instituted, and inducted, upon his own prayer or presentation, into the said church of St. Giles, as in the declaration mentioned, which last-mentioned church was then and there a benefice with cure of souls, within the meaning of the said Act: that the net yearly value of the said churches of St. Giles and St. Mary Magdalen, jointly, then and there greatly, to wit, by 500*l.*, exceeded the sum of 1,000*l.*: that the church of St. Mary Magdalen, which the said John George Storie had, up to the time of his resignation as aforesaid, held together with the said church of St. Giles, as one church, and which church of St. Mary Magdalen, upon a district being assigned thereto, as in the declaration mentioned, became and was, and thence hitherto had been, and continued to be, a benefice with cure of souls *in the diocese of the said Bishop, to wit, at Camberwell aforesaid, in the said county, thereupon, then and there, by reason of the premises, became and was vacant, and it then and there belonged to the said John George Storie to present, nominate, and appoint a clerk to the said church of St. Mary Magdalen; of which said avoidance, and of all which premises, the said John George Storie then and there had notice: that the said church of St. Mary Magdalen, so having become and being vacant as aforesaid, was, and continually remained, so vacant for and during the period of eighteen calendar months from and immediately after such

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avoidance and notice as aforesaid, and also for and during the full period of eighteen calendar months from and immediately after the day of such avoidance and notice as aforesaid, to wit, for four years, to wit, at Camberwell aforesaid, in the county aforesaid, neither the said John George Storie, nor the Ordinary, nor the Metropolitan, nor any other person whatsoever, having during all the time last aforesaid presented, nominated, or appointed a clerk thereto, and, by reason thereof, the said last-mentioned church devolved to our said sovereign lady the Queen, and it now belongs to our said sovereign lady the Queen, to present, nominate, and appoint a clerk to the said last-mentioned church so vacant as aforesaid, to wit, at &c.; and our sovereign lady the Queen has not as yet presented, nominated, and appointed a clerk thereto: that, after the said period of eighteen calendar months had elapsed, and not before, to wit, on the 1st of May, 1848, the said John George Storie, who, at the time of the last-mentioned church becoming vacant as last aforesaid, was, and thence continually to the pleading of the plea had been, seised of the advowson of the last-mentioned church, presented, nominated, and appointed a clerk, to wit, the said John George Storie, to the said Bishop, to be admitted, *licensed, instituted, and inducted to the said last-mentioned church, to wit, at Camberwell aforesaid, in the county aforesaid: and that thereupon the said Bishop refused to admit, license, institute, or induct the said John George Storie, upon his presentation, nomination, and appointment so made as aforesaid, as he lawfully might for the cause aforesaid; which was the disturbance in the declaration mentioned. Verification, and prayer of judgment.

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Third plea, that the said church of St. Mary Magdalen in the declaration mentioned, upon such assignment of a district being made, as in the declaration mentioned, became and thence continually had been, and still was, a benefice with cure of souls, in the diocese of the said Bishop, to wit, &c.: that the resignation by the said John George Storie of the said church of St. Giles, Camberwell, in the declaration mentioned, was, so as in the declaration mentioned, made and accepted, and notice of such acceptance was given by the said Bishop to the said John George Storie, to wit, at &c., more than eighteen calendar months before any presentation, nomination, or appointment was made to the church of St. Mary Magdalen in the declaration mentioned, or any disturbance was made by the said Bishop in respect of the said last-mentioned church, to wit, on the 28th of October, 1843. Verification, and prayer of judgment.

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Fourth plea, that the said church of St. Mary Magdalen in the declaration mentioned, upon such assignment of a district being made as in the declaration mentioned, became, and thence continually had been, and still was, a benefice with cure of souls, in the diocese of the said Bishop, to wit, at Camberwell aforesaid, in the county aforesaid: that the said admission, institution, and induction of the said John George Storie to the said church of St. Giles, Camberwell, in the declaration *mentioned, was, so as in the declaration mentioned, made, to wit, at Camberwell aforesaid, in the county aforesaid, after the passing of an Act of Parliament passed in the session of Parliament holden in the first and second years of the reign of her Majesty Queen Victoria, intituled "An Act to abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy," and more than eighteen calendar months before any presentation, nomination, or appointment was made to the said church of St. Mary Magdalen in the declaration mentioned, or any disturbance was made by the said Bishop in respect of the said last-mentioned church; the said church of St. Giles having, during all the time in the declaration and this plea mentioned, been a benefice with cure of souls within the meaning of the said Act, to wit, at Camberwell aforesaid, in the county aforesaid: and that the net yearly value of the said churches of St. Giles and St. Mary Magdalen, jointly, then, to wit, on the day when the said John George Storie was admitted, instituted, and inducted to the said church of St. Giles, as in the declaration mentioned, greatly, to wit, by 500*l.*, exceeded the sum of 1,000*l.*, to wit, at Camberwell aforesaid, in the county aforesaid. Verification and prayer of judgment.

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And, as to the plea of the said Bishop by him secondly above pleaded, the said John George Storie, not acknowledging anything above alleged by the said Bishop in his said second plea to be true, but protesting that the said church of St. Mary Magdalen did not become, nor was, vacant at the time nor in the manner in the said second plea mentioned, and further protesting that it did not belong to the said John George Storie to present, nominate, or appoint a clerk to the said church of St. Mary Magdalen until long after the time in the said plea mentioned, and further protesting that the said John George *Storie did not have notice of the said alleged avoidance, or of the premises in the said second plea in that behalf mentioned, and further protesting that the said church of St. Mary Magdalen was not, nor remained, vacant for or during the period

of eighteen calendar months in the said second plea mentioned, or during any period of eighteen months, and further protesting that the said John George Storie did present, nominate, and appoint a clerk to the said last-mentioned church within the period of eighteen calendar months next after the same had first become, and was, vacant, and further protesting that the said last-mentioned church did not devolve to our sovereign lady the Queen, nor did it then belong to our said lady the Queen to present, nominate, or appoint a clerk to the said last-mentioned church, and, lastly, protesting that the said second plea is wholly untrue in substance and in fact; nevertheless, the said John George Storie said that he, by reason of anything by the said Bishop in his said second plea alleged, ought not to be barred or precluded from having and maintaining his said action against him the said Bishop, because he said that the said second plea, and the matters therein contained, were not sufficient in law to preclude or bar the said John George Storie from having or maintaining his said action against him the said Bishop, and that he the said John George Storie was not obliged or bound by the law of the land in any manner to answer to the said second plea, in manner and form as the same was above pleaded, verification; wherefore, for the insufficiency of the said second plea in this behalf, the said John George Storie prayed judgment against the said Bishop, and his damages by him sustained by reason of the said hindrance, together with a writ to the said Metropolitan, to be adjudged to him &c.: And the said John George Storie, according to the form of the statute in such case made and provided, *states and shows to the Court here the following causes of demurrer, amongst others, to the said second plea, that is to say, that the said Bishop ought not to be received, nor can by law be received or allowed, to set up, show, or defend the right or title of our said lady the Queen, or the right or title of any other person, to the patronage of the said church of St. Mary Magdalen, or any such right or title to present, nominate, or appoint a clerk thereto, inasmuch as the said church is still vacant (as is confessed by the said plea), and neither has the said Bishop, nor has the said Metropolitan, nor has our said lady the Queen, nor has any other person than the said John George Storie, collated or presented thereto, or given or conferred the same to or upon any clerk, or elected so to do, upon, or for, or by reason of the said alleged lapse, or in any other manner; that the said plea does not show any cause or matter sufficient to enable the said Bishop to counterplead the right or title of the said

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John George Storie to present, nominate, or appoint a clerk to the said last-mentioned church, being so vacant as aforesaid ; that the said second plea does not sufficiently show that the said last-mentioned church had been vacant, in such manner or so that a clerk might or could have been inducted, instituted, or admitted therein, or presented, nominated, or appointed thereto, for the full period of eighteen calendar months before the said John George Storie nominated, presented, or appointed a clerk thereto ; that the said second plea does not sufficiently allege or show the day or time when the said church devolved to our said lady the Queen, as alleged in the said plea ; that the said second plea does not sufficiently, and with certainty, show when, and at what time, and how, and on what act or event, the said church of St. Mary Magdalen became vacant, that is to say, whether the same became vacant on the resignation of the said John *George Storie of the said church of St. Giles, or the acceptance of such resignation, or the notice thereof, in the said second plea respectively mentioned, under and by force of the statutes relating to church-building, in the said declaration mentioned, or whether the said John George Storie continued to hold the said church of St. Mary Magdalen after such resignation, and until his said re-induction, re-institution, or re-admission into the said church of St. Giles, and whether the said church of St. Mary Magdalen then became vacant under and by force of the statute relating to the holding of benefices in plurality, in the said second plea mentioned, or how otherwise ; that the said plea is double and multifarious, in this, to wit, that it suggests, and relies on, two or more distinct and unconnected acts and matters, done and occurring at different times, as each causing the said church of St. Mary Magdalen to become vacant, that is to say, first, the resignation of the said church of St. Giles, or the acceptance of such resignation, or the notice thereof, and, secondly, the re-admission, re-institution, or re-induction of the said John George Storie to the said last-mentioned church ; that the said second plea is repugnant and inconsistent, in this, to wit, that the same supposes that the said church of St. Mary Magdalen became and was vacant on the resignation by the said John George Storie in the said second plea mentioned, of the said church of St. Giles, or the acceptance of such resignation, or notice thereof, under and by force of the Church-building Acts, and yet that the said second plea also supposes that he continued to hold the said church of St. Mary Magdalen until his re-induction or re-admission to the

said church of St. Giles, and that thereupon the said church of St. Mary Magdalen became void by force of the said statute relating to pluralities; that the matter relating to the said last-mentioned statute, is irrelevant, and the introduction *thereof into the plea tends to embarrassment and prolixity of pleading; that the said church of St. Mary Magdalen is not shown to have been a benefice with cure of souls, within the meaning of the last-mentioned Act, at the time when the same is alleged in the plea to have become vacant; that the said second plea does not allege or show that the said John George Storie was admitted, instituted, inducted, or licensed to the said church of St. Giles, contrary to the provisions of the Act in the said second plea mentioned; that the same does not show that the said churches of St. Mary Magdalen and St. Giles were not within the exceptions in such Act made and provided; that it appears in and by the declaration, that James Sydney Darvell, clerk, at the time of the consecration of the said district church of St. Mary Magdalen, and of the division and assignment of the said district parish, had been and was duly appointed and licensed a stipendiary curate to serve the said last-mentioned church, and continued to fill the said last-mentioned church, as such stipendiary curate, until the year 1848, and that the said last-mentioned church could not, and did not, become, and was not, vacant, at least so as to be subject to lapse, until the said James Sydney Darvell ceased to be such stipendiary curate; that the second plea does not allege or show that the licence of the said stipendiary curate was revoked or determined; that the said second plea ought to have shown how, and in what manner, the said James Sydney Darvell ceased to be such stipendiary curate as aforesaid, and to have shown that the said church of St. Mary Magdalen was and remained vacant for eighteen calendar months after the said James Sydney Darvell ceased to be such stipendiary curate; that it does not sufficiently appear how or in what way the said period of eighteen calendar months in the said second plea mentioned, is computed, or at or from what date such *period commenced; that the said second plea is argumentative, and amounts to a traverse of the right of the said John George Storie, as alleged in the declaration, and ought to have concluded to the country; that the said second plea does not sufficiently deny, or confess and avoid, the declaration, &c.

The third and fourth pleas were also demurred to, on similar grounds.

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Manning, Serjt. (with whom was *W. H. Cooke*), in support of the demurrers (1) :

It is clearly not competent *to the Bishop to counterplead the title of the plaintiff, as patron, by setting up the Queen's title by lapse. The leading case upon this subject is that of *Elvis v. The Archbishop of York* (2). There, Sir William Elvis brought a *quare impedit* to present to the church of Badworth, and declared that Sir Gervas Elvis, Knt., was seised of the manor of Sanby, to which the said advowson was appendant in fee, and held the same of the

(1) The points marked for argument on the part of the plaintiff, were as follows :

"That the second plea is bad for the following, amongst other, reasons : first, that the defendant cannot counterplead the plaintiff's title, the defendant not having collated by lapse ; secondly, that the plea does not sufficiently show that the plaintiff has lost the right to present, or that the same has lapsed ; thirdly, that the right of presentation could not lapse, as supposed by the plea, inasmuch as the district church was filled and served by a licensed stipendiary curate (see the statutes, 1 & 2 Vict. c. 107, s. 13, 2 & 3 Vict. c. 49, s. 11, and 59 Geo. III. c. 134, s. 12) ; fourthly, that the plea does not sufficiently show when or upon what event the alleged title of our lady the Queen to present, accrued ; fifthly, that the plea is double and repugnant, in relying on the resignation of the church of St. Giles, and also on the re-acceptance thereof, as vacating the district church ; sixthly, that the plea is ambiguous and uncertain ; seventhly, that the plea does not traverse or confess and avoid the declaration ; eighthly, that the plea does not show title in the defendant, or any other person through or under whom he claims or acts ; ninthly, that the district church is not alleged to be full ; tenthly, that the plea does not show that the acceptance of the church of St. Giles was contrary to the statute 1 & 2 Vict. c. 106, or that a vacancy was caused thereby :

"That the third and fourth pleas respectively are bad, for the following,

amongst other, reasons : first, that the defendant cannot counterplead the plaintiff's title ; secondly, that the pleas do not show that the plaintiff has lost the right to present, or that it had lapsed, or devolved to, or is vested in, any other person ; thirdly, that the pleas do not show when or how the district church became vacant, or that it was vacant for eighteen months before a presentation or disturbance ; fourthly, that the district church is not alleged to be full ; fifthly, that the presentation *was not subject to lapse during the licence and incumbency of the stipendiary curate ; sixthly, that the pleas do not traverse or confess and avoid the declaration ; seventhly, that the pleas are vague, ambiguous, and uncertain ; eighthly, that the pleas are wholly irrelevant ; ninthly, that the pleas do not show title in the defendant, or other person under whom he claims or acts ; tenthly, that the pleas do not show that any person other than the plaintiff has ever presented to the said district church, or elected so to do :

"And that the fourth plea is bad, eleventhly, because it does not show that the acceptance of the church of St. Giles was contrary to the statute 1 & 2 Vict. c. 106 ; twelfthly, that the re-admission, institution, and induction to the church of St. Giles, and the time thereof, respectively, were immaterial, and that the plaintiff could not take issue thereon."

(2) Hobart, 315 ; Sir W. Jones, 4 ; per nom. *Hellwayes & Archevesque de Yorke & Al.*

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King, and, so seised, did present one George Turpin, his clerk, who was admitted and instituted, &c.; that the said Sir Gervas, so seised, was attainted of felony, and executed (1); that, by force thereof, the King was seised of the said manor *ad quod* &c., in fee, in right of his Crown, and, so seised, did grant the manor and advowson thereunto belonging, to the plaintiff and his heirs, *adeo plenè et integrè*, &c.; and that, by virtue thereof, he entered, and was seised thereof in fee, and, so being seised, the church became void, by the death of Turpin, whereby it belonged to the plaintiff to present, and the defendants did disturb him, &c. The Archbishop, confessing the seisin of Sir Gervas Elvis, and the presentation of Turpin, and the attainder and *execution, as the plaintiff had set forth in his declaration, pleaded, that, by virtue of the said attainder, the King was seised of the manor *ad quod* &c., in fee, in right of his Crown, and so seised, the church became void by the death of Turpin, whereby the King, to the church, being void, did present to the said Archbishop, Thomas Bishop, whom he caused to be admitted, instituted, and inducted, as it was lawful for him to do, &c.: whereupon the plaintiff demurred. Lord HOBART, in delivering judgment, after having adverted to the form of pleading for the Ordinary and incumbent at common law, proceeds, "Now we will see how it stands this day, and what change is made by the statute 25 Edw. III. c. 7, *pro clero*, stat. 3, and what is the true meaning and use of that law, which is thus: When an Archbishop, Bishop, or other Ordinary, hath given a benefice of right devolute unto him by lapse of time, and after the King presenteth, and taketh his suit against the patron, who percase will suffer that the King shall recover without action tried, in deceit of the Ordinary, or the possessor of the said benefice, that, in such cases, and in all other cases like, where the King's right is not tried, the Archbishop, or Bishop, Ordinary, or possessor, shall be received to counterplead the title taken for the King, and to have his answer, and to show and defend his right upon the matter, although that he claim nothing in the patronage in the case aforesaid. The particular cause of this law, is, for the relief only of the Ordinary that hath collated by lapse, and of the clerk that is so collated, that they may both plead to the title against the King; which when you consider, it was a necessary law as against the

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(1) As to the share of Sir Gervas Helwis in the murder of Sir Thomas Overbury, see Bacon's Works, by Birch, Vol. IV. p. 460, Vol. VI. pp. 107, 108 [and now Dict. Nat. Biog. s.n. Helwys, Sir Gervase.—F. P.].

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King more than against common patrons; for, the King not being bound by lapse of time, if the common patron suffered a lapse, and the Bishop collated lawfully, yet, if the King, pretending himself patron, brought a *quare impedit* against *the Ordinary and incumbent, there was no means for them to save themselves, since they could not deny the King's title, and maintain the patron's, in whose default the lapse took place; but the statute gives remedies likewise in like cases by express words, so that cases of a like nature are rather remedied by letter than equity. And therefore, first, in the case of lapse, a common person might by practice have turned out a lawful collatee in one only case, and that was this: A common person, no true patron, presents within six months, and the true patron himself presents not in time, whereupon the Ordinary collates by lapse, against whom the pretender brings a *quare impedit*, because his clerk was refused, wherein he must needs prevail if his title be good: and it must be taken for good, because neither Ordinary nor incumbent could deny it; for, *de non apparentibus et de non existentibus, eadem est ratio*. This is one of the like cases meant in the statute; for, in all other cases, the lapse is an equal title against all common persons. But the commonest like case, and, that which extends furthest, is, the purview; for, every incumbent that is called a possessor, as well by presentment as by collation, is allowed, by the words of the law, to counterplead the King's title, and to show and defend his own right upon the matter, though he claim nothing in the patronage in the case aforesaid. Note all the words, for they have all their weight; for, first, the incumbent must be a possessor; so that, if he have his presentation, admission, and institution upon the lawful title, yet remains, as he was before, under the mischief of the common law, because he is not a possessor, according to the letter of the law, till induction. Again, I say, that, though he be a possessor, he must, by the letter and meaning of this law, as well show and defend his own right, as counterplead his adversary's. And therefore clearly he cannot make himself parson impersonee *of the presentation of J. S., and defend himself by the title of J. D., under whom he claims not, though that were sufficient to destroy the plaintiff's title, by confessing and avoiding, or the like; neither can he counterplead the plaintiff's title, but must also make a title to himself, by the word and meaning of this law,—which I speak not to bind the incumbent by the patron's plea, whereof I will speak hereafter, when I come to the incumbent's plea. But, touching the Ordinary's

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plea upon this statute, I hold plainly that he can no otherwise plead than he could at the common law, but only where he hath collated actually by lapse; for, though the incumbent of presentation be also admitted to plead, by the meaning of this law, under the word 'like case,' because the case is like indeed, yet the Ordinary's case before actual collation, is no ways like in case; for, he hath gotten no interest for himself, nor his clerk, in the church. And, therefore, if the incumbent instituted only at the presentation of another, be not within the relief, much less shall the Ordinary, that hath no interest, but an office only, that ought to be indifferent to all patrons, and maintain no side." That authority was recognised in the recent case of *Apperley v. The Bishop of Hereford* (1), where it was held, that the Ordinary cannot, before he has collated, counterplead the patron's title. This objection applies to all the pleas.

The next objection to the second plea, is, that it does not sufficiently show that the plaintiff has lost the right to present, or that there has been any lapse. It is difficult to see what answer can be given to that.

(WILDE, Ch. J.: You contend, that, until the license is revoked, the church continues full.

H. Hill: The real question is, whether the district church was filled *by the incumbent of the mother church. The defendants will mainly rely on the 58 Geo. III. c. 45, ss. 13, 21 to 25, and 67, and 59 Geo. III. c. 134, ss. 12, 13, 19.)

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The 58 Geo. III. c. 45, s. 13, enables the Commissioners to grant money for the building of additional churches in parishes of certain population, and in want of accommodation.

[He referred to sections 21, 22, 24, 25 and 67, and to 59 Geo. III. c. 134, ss. 12, 13, and 19, and 1 & 2 Vict. c. 107, s. 4, and continued:] The plaintiff, however, relies upon the 13th section of the 1 & 2 Vict. c. 107, which enacts, "that, in all district churches and district chapelries, the licence of the stipendiary curate appointed to serve the chapel of such chapelry, shall not be rendered void by the avoidance of the church of the parish, or district parish, in which such chapel is situate, unless the same shall be revoked by the Bishop of the diocese under his hand and seal; but such

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licence shall continue in force, unless otherwise directed, as aforesaid, by such Bishop, notwithstanding the avoidance of the church of the parish or district parish, any statute, law, canon, or usage to the contrary notwithstanding." That modifies the provisions of the former statutes: it dispenses with the necessity of a new appointment. The effect of the statute is, to make the stipendiary curate the incumbent. On the death or avoidance of the incumbent, the interest of the stipendiary curate, would, but for the 1 & 2 Vict. c. 107, s. 13, be gone. The effect of that section is, to make him continue curate until a new one has been presented to the Bishop to be licensed. The incumbent has appointed a stipendiary curate to the district church: the incumbent dies, or resigns: the consequence is, that the patron must present to the mother church, and may present a proper curate to the district church; but, until he does so, the stipendiary curate continues to be the curate of the district church.

(MAULE, J.: Here, the church of St. Giles, Camberwell, is vacated, does that vacate the district church of St. Mary Magdalen, *Peckham ?)

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No: the statute 1 & 2 Vict. c. 107, s. 13, prevents that.

(MAULE, J.: The patron has a right to present; and the Bishop may revoke the licence of the stipendiary curate: is the curacy full ?)

Yes.

(MAULE, J.: Full of a person who may at any moment be turned out !)

The next ground of objection to the pleas, is, that it is not sufficiently shown when, or upon what event, the title of the Queen to present accrued. It does not appear whether it is the avoidance or the notice that is relied upon as the starting point from which the eighteen months are to run.

(MAULE, J.: That is immaterial, the latest of those events being remote enough. If the time runs from the resignation, the allegation must be taken to mean that; if from the notice, it means that: whatever is unnecessary, will be rejected as surplusage.)

Hugh Hill (with whom was *Sumner*), for the defendant (1) :

On the face of the declaration, the plaintiff *shows that he is both patron and incumbent. He alleges that he resigned the living of St. Giles, Camberwell, but not the district church of St. Mary Magdalen.

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(MAULE, J. : Though he might resign the district church without resigning the mother church, he could not resign the latter, and retain the former.)

It is submitted that he could. Being possessed of the incumbency of St. Giles, Dr. Storie was disqualified from being presented to the district church. His incumbency of the mother church having ceased on his resignation, he is expressly prevented from holding the district church, by the 1 & 2 Vict. c. 106, s. 11, which enacts, "that, if any spiritual person holding any cathedral-preferment or benefice, shall accept any other cathedral-preferment or benefice, and be admitted, instituted, or licensed to the same, contrary to the provisions of this Act, every cathedral-preferment or benefit so previously held by him, shall be and become *ipso facto* void, as if he had died or had resigned the same, any law, statute, canon, usage, custom, or dispensation to the contrary notwithstanding."

(1) The points marked for argument on the part of the defendant, were as follows :

"That the facts admitted on the pleadings being, that the district church of St. Mary Magdalen was carved out of the plaintiff's vicarage of the parish of St. Giles, under the 58 Geo. III. c. 45, and 59 Geo. III. c. 134, that Mr. Darvell was then appointed and licensed stipendiary curate of the district church, that the plaintiff resigned the mother church, and was, upon his own presentation, re-instituted and inducted thereto more than eighteen months before he presented to the district church, Mr. Darvell having resigned the stipendiary curacy of the district church in the interval, but no perpetual curate having been appointed thereto, first, the district church became vacant, either by the plaintiff's resignation of or re-institution and induction to the mother church ; secondly, and this though Mr. Darvell was, at both those

times, stipendiary curate of the district church ; thirdly, consequently, that, no perpetual curate having been appointed within eighteen months, the district church lapsed to the Crown under the 58 Geo. III. c. 45, s. 25 ; fourthly, that the enactment (1 & 2 Vict. c. 107, *s. 13), that, in all district churches and district chapelries, the licence of the stipendiary curate appointed to serve the chapel of such chapelry, shall not be rendered void by the avoidance of the church of the parish or district parish in which such chapel is situate, unless the same shall be revoked by the Bishop of the diocese, under his hand and seal, does not prevent the district church becoming vacant, or lapse to the Crown taking place, under the circumstances stated ; fifthly, that it is perfectly competent to the defendant to set up the title of the Crown to present by way of lapse, in opposition to the title of the plaintiff ; sixthly, that the pleas are good in point of form."

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Dr. Storie resigns St. Giles's; he presents himself *de novo* to St. Giles. Mr. Darvell resigns the district church; Dr. Storie then presents himself to the district church.

(MAULE, J. : He thereby vacates St. Giles.)

Only if his holding the two livings is incompatible with the 21 Hen. VIII. c. 13.

[*88] (MAULE, J. : No doubt, these two livings *cannot be held together : it is the first that is void. There is nothing to prevent Dr. Storie from holding St. Mary Magdalen, giving up St. Giles.)

It is submitted, that, on Dr. Storie's resignation of St. Giles, St. Mary Magdalen was not full of Mr. Darvell, so as to prevent a lapse.

Although it is true that the Ordinary cannot, as against the patron, counterplead by a lapse to himself, yet the case is different where the lapse is to the Crown. In Watson's Clergyman's Law (1), it is said : "After a church is lapsed to the Bishop or Archbishop, it concerns them to take advantage thereof with all speed, lest the benefit be lost; for, after a church is lapsed to the immediate Ordinary, if the patron doth present before he hath filled the church, the Ordinary ought to receive his clerk: for, lapse to the Ordinary is only an opportunity of executing a trust, viz. of seeing the cure supplied, in case of the patron's neglect; which being performed by the patron himself, the Ordinary can take no advantage by it: 11 Hen. IV. 80 (2); 18 Edw. III. 21 a (3); 13 Edw. IV. 3 (4); 43 Edw. III. 11 a (5); Trin. 18 Hen. VII. Keilway, 50. And by HOBART, in *Colt and Glover's case*, p. 154; 28 & 29 Eliz. *Beverley v. The Bishop of Canterbury and Cornwall* (6); Doctor and Student, l. 2, c. 36. If one hath the nomination, and another the presentation, and, the six months being incurred, he that hath the presentation only presenteth to the Bishop, before the Bishop hath taken benefit of the lapse, without any nomination made to him, in such case the Bishop is bound to admit the clerk, as the clerk of the very patron. By Doderidge, in his Complete *Parson, Lect. 12, fo. 67. Or, though the patron did not present within his six months, but the Ordinary did collate before the expiration thereof, the patron is not thereby barred from presenting, but may

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(1) Ed. 1747, pp. 116, 117.

(4) M. 13 Edw. IV. fo. 3, pl. 5.

(2) T. 11 Hen. IV. fo. 79, 80, pl. 22.

(5) H. 43 Edw. III. fo. 10 b, 11 a,

(3) R. v. *Bishop of Carlisle*, E. 18 Edw. III. fo. 21, pl. 37.

pl. 33.

(6) 1 And. 148.

present after the six months be expired, and his clerk ought to be received: *Green's case* (1); *Boswell's case* (2). But, if the Bishop, in such case, after the six months, and before any presentation exhibited, hath made a new collation, the patron is barred: 2 Roll. 368; Co. Litt. 344. So, though lapse be incurred to the inferior Ordinary, and the Archbishop doth collate within the inferior Ordinary's six months, the patron's clerk, if he be presented, ought to be received; because the collation of the Metropolitan is tortious, and doth not put the patron to his *quare impedit*, but is null, and as no collation to the patron: By Rolle, in his Abridgment, Vol. ii. p. 368 (3). But this is doubted of, and objected, that the wrong is here done to the Ordinary only, and not to the very patron: 11 Hen. IV. 80 (4). The like law, if lapse be accrued to the Metropolitan; for, then, if the patron present to the inferior Ordinary, whilst the church remains void, he is bound to receive his clerk, and the Metropolitan is barred: *Booton v. The Bishop of Rochester* (5); Doctor and Student, l. 2, c. 36. But, if either the Ordinary of the diocese, or Metropolitan, hath collated his clerk, whilst the turn was respectively theirs, although the clerk be not inducted, the patron's clerk, if after that presented, is not to be admitted: Trin. 10 Eliz. Dyer, 277. Or, if the inferior Ordinary, after the time is gone by lapse to the Metropolitan, hath collated his clerk to the benefice that is in lapse, although this collation be *tortious to the Metropolitan, yet it seems that it takes away the presentation of the patron, so that he shall not present, and is only an usurpation upon the Metropolitan: By FINCH, J., at Somerset Assizes; *Sir Francis Popham v. The Bishop of Bath and Wells*, 2 Roll. 350, 368 (6). And thereby the Metropolitan is put out of possession, and driven to his *quare impedit*: *Green's case*, 6 Co. 29 b; *Boswell's case*, 6 Co. 50; Co. Litt. 344. It hath been a question whether the Bishop ought to admit the patron's clerk, after the title of lapse is passed from the Metropolitan to the King: Trin. 10 Eliz. Dyer, 277; and by HOBART, the patron's presentation takes place, after the church is lapsed to the King, if it be exhibited to the Ordinary before the King's: in *Colt and Glover v. The Bishop of Coventry*, Hobart, 157. Because the patron's right to present continueth until the title by lapse is executed, and the King's title is not vested in him in this case absolutely, as other

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(1) 6 Co. Rep. 22.

(4) *Supra*, 298, note (2).

(2) 6 Co. Rep. 50.

(5) Hutton, 24.

(3) Translated, 17 Vin. Abr. 389, pl. 4.

(6) 17 Vin. Abr. 319, pl. 6.

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titles are, but conditionally, viz. if he doth present before the patron : because the King hath it only as supreme Ordinary : Hutton, 24. But, by others, the turn by lapse is so vested in the King, that, if the patron's, or other person's, clerk be admitted to a church after 'tis come to the King by lapse, the King by *quare impedit* may recover the presentment, and remove such clerk : *Beverley v. The Bishop of Canterbury* (1) ; *Baskerville's case* (2) ; 27 Edw. III. 85 (3) ; *The Bishop of Lincoln's case* (4) ; *Cumber v. The Bishop of Chichester*, cited in the case of *Rex v. The Archbishop of Canterbury and Prust* (5). And this latter opinion is taken to be the law." In 2 Bla. Comm. 277, it is said : " If the Bishop doth not collate his *own clerk, immediately to the living, and the patron presents, though after the six months are lapsed, yet his presentation is good, and the Bishop is bound to institute the patron's clerk : for, as the law only gives the Bishop this title by lapse, to punish the patron's negligence, there is no reason, that, if the Bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn. If the Bishop suffer the presentation to lapse to the Metropolitan, the patron also has the same advantage, if he present before the Archbishop has filled up the benefice ; and that for the same reason. Yet the Ordinary cannot, after the lapse to the Metropolitan, collate his own clerk, to the prejudice of the Archbishop : for, he had no permanent right and interest in the advowson, as the patron hath, but merely a temporary one ; which having neglected to make use of during the time, he cannot afterwards retrieve it. But, if the presentation lapses to the King, prerogative here intervenes, and makes a difference ; and the patron shall never recover his right till the King has satisfied his turn by presentation : for, *nullum tempus occurrit Regi*." In 17 Viner's Abridgment, 392, Presentation (B. c. 2), pl. 4, it is said, that, " when a lapse is in the King, he is not compellable to present, and, till he presents, the Ordinary has the cure *de animis* (6), and he shall provide for it ; so the difference is between the *cura animarum* and the patronage : Per DODDERIDGE, J., 1 Roll. R. 464, in the case of *Colt v. Glover*." In Watson's Incumbent (7), is the following passage : " Note, that neither plaintiff nor defendant may

(1) 1 And. 148.

(2) 7 Co. Rep. 28.

(3) M. 27 Edw. III. fo. 8, pl. 25.

The reference in the text is to the old edition of Y. B.

(4) Owen, 89.

(5) Hetley, 124.

(6) *Sic* in the report in Rolle.

(7) P. 288.

have judgment or execution, but a third person, that is no party to the suit; for, if, in the debate of a cause betwixt a plaintiff and defendant, it doth appear to the Court, either by the declaration of *the plaintiff, or by pleading, or confession of the parties, that neither of them hath right, but the presentation belongs to the King, the Court may, nay, they ought to, award a writ to the Bishop for the King, and without prayer on the part of the King; for, the Court and Judges are the King's counsel." Here, the plea merely adds to the facts stated in the declaration, that Dr. Storie held both the mother church and the district church as one church, being together of a greater yearly value than 1,000*l.*, whereby the church of St. Mary Magdalen became vacant; and that, eighteen months having elapsed since the resignation by Dr. Storie of the church of St. Giles, and notice thereof, the right to present vested in the Crown: so that, by reason of the prerogative of the Crown, the plaintiff is not entitled to recover. It is, therefore, not like the case of a Bishop setting up the title of a private individual. In *Apperley v. The Bishop of Hereford*, the Bishop pleaded, not the title of the Crown, but his own title to present by lapse. For these reasons, it is submitted that Mr. Darvell was not incumbent so as to prevent a lapse, that the title to present was in the Crown, and that it was competent to the Bishop to plead that.

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Manning, Serjt., in reply :

The distinction attempted to be set up between the present case and *Elvis v. The Archbishop of York*, on the ground that the Crown is interested here, is not well founded: and, in truth, that was a case of title in the Crown. The reason why the Ordinary is not permitted to counterplead, is, that he is a stranger to the advowson. He cannot set up the *jus tertii*: and the rule applies with equal force in the case of the Crown, as in the case of a subject. Besides, a mere allegation of title in the Crown, is not enough to entitle the Court to interfere in the way suggested. In the passage last cited from Watson, the *learned author adds: "But this must be when the King's title appears so clear *in allegatis et probatis* to the Court, as that it is infallible both against plaintiff and defendant."

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Cur. adv. vult.

WILDE, Ch. J., now delivered the judgment of the COURT (1):

We have considered this case, and we are of opinion that the

(1) WILDE, Ch. J., MAULE, J., CRESSWELL, J., and WILLIAMS, J. See *infra*, p. 302.

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declaration discloses a perfectly good title in the plaintiff to present, and that the pleas afford no answer. We considered the law to be well settled by the case of *Elvis v. The Archbishop of York*, confirmed by *Apperley v. The Bishop of Hereford*, viz. that it is not competent to the Bishop to counterplead the patron's title.

With regard to the other objection, that the incumbent, being in possession of the church of St. Giles, Camberwell, could not be admitted to the church of St. Mary Magdalen, Peckham, it appears to be quite clear, according to the doctrine laid down by this Court in *Apperley v. The Bishop of Hereford*, that, by the admission of Dr. Storie to the church of St. Mary Magdalen (the two livings being together worth more than 1,000*l.* per annum), the incumbency of St. Giles became, *ipso facto*, void. We are, therefore, of opinion that there is no objection to the admission of the plaintiff's clerk on that ground, and that the pleas are unquestionably bad, and therefore the plaintiff is entitled to judgment.

Judgment for the plaintiff.

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[17 C. B. 653]

(17 C. B. 653—659.)

In *quare impedit*, the Ordinary cannot counterplead the patron's title to present, by setting up title in a third person; and he does so as much by setting up a right in the Queen to present by lapse, as by any other title.

Where the incumbent of a parish church presents himself to a district church within the parish, created under the statutes 58 Geo. III. c. 45, and 59 Geo. III. c. 134, the annual value of the two livings exceeding 1,000*l.*, the parish church becomes, under the provision of the 1 & 2 Vict. c. 106, ss. 4, 11, *ipso facto* void.

THIS was a *quare impedit*, in which the COURT in Hilary Term, 1850, gave judgment for the plaintiff: [*vide supra*]. The written judgment, which was prepared by the then Chief Justice WILDE, was at the time mislaid, but has since been found amongst the papers of the late Lord Truro.

WILDE, Ch. J.:

This is a case of *quare impedit*, in which the plaintiff complains of a disturbance in his right of presentation to the church of St. Mary Magdalen, Peckham, and he states in his declaration that he was seised of the advowson of the church of St. Giles, Camberwell, and that, under the authority of the statutes made in that behalf, a church afterwards called the church of St. Mary Magdalen had been built, and that an ecclesiastical district had

been divided from the said parish of St. Giles, and assigned and appropriated to the said church of St. Mary Magdalen as a district parish church for all ecclesiastical purposes, and had become in law a distinct benefice presentative, and that the plaintiff remaining seised of the advowson of the vicarage of St. Giles, became seised as a fee of the perpetual right of presentation to the incumbency of the parish of St. Mary Magdalen: that afterwards the parish church of St. Giles became vacant by the resignation of the plaintiff, and thereupon the said plaintiff presented himself to the said church, and was thereupon duly admitted, &c.; and that, whilst the plaintiff was seised of the right of presentation to St. Mary Magdalen, the Rev. J. S. Darwell, clerk, who had been *appointed by the plaintiff and had been duly licensed to be stipendiary curate to serve the said district church, duly resigned the said stipendiary curacy; and that thereupon, the plaintiff remaining seised of the right of presentation to the said district church which had so become vacant, it then belonged to the plaintiff to present a clerk, but the Bishop unjustly hindered him, &c.

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To this declaration there were several pleas, but three only are before the Court.

The second plea upon the record, after stating the division of the parish of St. Giles, and the assignment of the district parish of St. Mary Magdalen, and that the church of St. Giles became vacant by the resignation of the plaintiff, who was afterwards admitted, &c., upon his own presentation, to the church of St. Giles, states, that the church of St. Mary Magdalen, which the plaintiff up to the time of his resignation held together with the church of St. Giles as one church, and which church of St. Mary Magdalen, being a benefice with cure of souls, by reason of the premises, became vacant, and it belonged to the plaintiff to present; that the said church of St. Mary Magdalen remained vacant more than eighteen months, neither the plaintiff nor the Ordinary nor the Metropolitan, nor any other person having presented, by reason whereof the right devolved to the Crown to present a clerk; that no clerk had yet been presented; that, after a period of eighteen months had elapsed, and not before, the plaintiff, who at the time the church became vacant had been seised of the advowson, nominated a clerk to the said church, whereupon the Bishop refused to admit, &c., for the cause aforesaid,—concluding with a verification.

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The third plea states that the plaintiff ought not to present, because the church of St. Mary Magdalen was a benefice with cure of souls, and that the resignation of the plaintiff of the church of St. Giles was accepted *by the Bishop, and notice of such acceptance given, more than eighteen months before the plaintiff's presentation, or any disturbance by the Bishop.

The fourth plea states, that the church of St. Mary Magdalen is a benefice with cure of souls, and that the presentation, &c., of the plaintiff to the church of St. Giles was after the passing of the statute 1 & 2 Vict. c. 107, intituled "An Act to abridge the holding of benefices in plurality," and more than eighteen months before the presentation to St. Mary Magdalen, or any disturbance, &c., in the said church of St. Giles, being a benefice with cure of souls; and that the value of the two churches jointly exceeded the annual sum of 1,000*l*.

To these three pleas the plaintiff has demurred specially, assigning, among other causes, that the church of St. Mary Magdalen being yet vacant, it is not competent to the defendant, the Bishop, to counterplead the title of the plaintiff, as he has attempted to do by these pleas.

On the part of the plaintiff, the authorities relied upon were the cases of *Elvis v. The Archbishop of York* and others, reported in Hobart, 815, and also in Sir William Jones, p. 4 (1); and also the case of *Apperley v. The Bishop of Hereford*, 3 Moore & Scott, 102, 9 Bing. 681: and these cases appear to the Court to be decisive authorities in support of the objection.

In the first case, of *Elvis v. The Archbishop of York* and others, the declaration alleged that Sir Gervas Elvis, Knight, was seised of the manor of Sanby, with the advowson of the church of Bedworth appendant, in fee, and held the same of the King, and, being so seised, presented George Turpin, his clerk, who was admitted, &c.; that the said Sir Gervas was attainted of felony, and executed, by force whereof the King became seised of the *manor *ad quod*, &c., and granted the same manor and advowson to the plaintiff, who became seised in fee; that the church became void by the death of Turpin, whereby it belonged to the plaintiff to present, and the defendant disturbed him, &c. The Archbishop, as Metropolitan, pleaded, confessing the seisin of Sir Gervas Elvis, and the presentation of Turpin, and the attainder of Sir Gervas; but alleged further, that, by virtue of the attainder, the King became seised of the

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(1) *Per nom. Helwyses & Archevesque de Yorke & Al.*

manor ad quod, and so seised, the church became void by the death of Turpin, whereby the King to the church, being void, did present to the Archbishop the said Thomas Bishop, whom he caused to be admitted, &c.; without this, that the King did grant to the plaintiff the advowson, &c., as alleged, *prout*, &c.: whereupon the plaintiff demurred in law, generally.

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It is unnecessary to notice the proceedings upon the pleas by the other defendants, as the questions which arose upon them have no application to the present case. It will be observed that the title set up by this plea, was, a title in the Crown. A very learned and elaborate judgment was pronounced by Lord HOBART upon the precise question whether it was competent to the Ordinary or Metropolitan to counterplead to the title of a plaintiff. The right so to do being considered first as it stood upon the common law, and secondly with reference to the statute of 25 Edw. III. st. 3, c. 7: and the unanimous opinion of the Court upon that point, was, that the plea was bad, and that, at common law, neither Ordinary, as Ordinary, either before collation or after, nor the incumbent either of his collation nor of the presentation of any other, could plead to the title of the patronage, because neither of them had an interest in the patronage, and therefore could not dispute that with which they had nothing to do; that the collation by lapse was nothing but institution and induction in respect of his office as Ordinary; and that the law would not let in a *thing so absurd as to admit two to dispute the interest of a third: and the reason and grounds of this law are stated at large: and, as nothing was objected to them upon the argument of this case, it is sufficient to refer to them without repeating them. And it was also held to be clear that the statute of 25 Edw. III. stat. 3, c. 7, gave no right to plead otherwise than the Ordinary could plead at common law, as he acquired no interest for himself, nor his clerk, in the church.

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The case of *Apperley v. The Bishop of Hereford* gave rise to precisely the same question: the title set up did not refer to the Crown. The Court held that the case of *Elvis v. The Archbishop of York* was decisive of the question, and that the law was clearly laid down, that, before the statute of 25 Edw. III. stat. 3, c. 7, the Bishop could not in any case dispute the title of the patron to present; and that, as in the case then at Bar, no collation had been made, that statute did not help the defendant.

Upon the part of the defendant, it was stated generally in answer to the objection before stated, that true it was that the Ordinary

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could not plead lapse to himself, but that he could plead lapse to the Crown; and the case in Hobart was attempted to be distinguished, upon the ground that, in that case, the plaintiff's title was traversed, but that, in the present case, the title was admitted, but a right in the Crown to present by lapse only was pleaded. No authority was referred to in support of this distinction; and the Court is of opinion that it is not founded upon any principle, and that the law is clear and settled, that the Ordinary cannot controvert the title of the plaintiff to present; and that he does so as much by setting up a right to present by lapse as by any other title. The objection, therefore, to the pleas appears to be well founded, upon principle and authority.

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It was also objected that the third plea was bad, upon another ground. That plea is founded upon the 1 & 2 *Vict. c. 106, s. 4, by which it is enacted "that, except as hereinafter provided, no spiritual person holding a benefice with a population of more than 3,000 persons, shall accept and take to hold therewith any other benefice having, at the time of his admission, institution, or being licensed thereto, a population of more than 500 persons, nor shall any spiritual person holding a benefice with a population of more than 500 persons, accept and take to hold therewith any other benefice having at the time of his admission, institution, or being licensed thereto, a population of more than 3,000 persons; nor shall any spiritual person hold together any two benefices, if, at the time of his admission, institution, or being licensed to the second benefice, the value of the two benefices jointly shall exceed the yearly value of 1,000*l.*;" and the plea alleges that the churches of St. Giles and St. Mary Magdalen did jointly exceed the value of 1,000*l.*; and it was insisted on the part of the defendant, that the plaintiff was disqualified to be instituted to the church of St. Mary Magdalen while holding the living of St. Giles. To this it was answered, that, by the institution and induction to the living of St. Mary Magdalen, the church of St. Giles would become *ipso facto* void; and that the acceptance of an office which could not be holden with some other office already possessed, vacated the first office; and the before-mentioned case of *Apperley v. The Bishop of Hereford* was cited as a distinct authority applicable to the present case. The plaintiff in that case was owner of the advowson of Stoke Lacey, and also became incumbent, upon his own presentation; and the declaration averred that the defendant, being incumbent of Stoke Lacey, was admitted, instituted, and inducted into the vicarage of Ocle Pritchard,

the two churches being respectively benefices with cure of souls, whereby it belonged to him to present to Stoke Lacey; that he accordingly presented Beetham, his clerk, to be admitted, *&c.; but that the Bishop would not admit, but unjustly hindered, &c.

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It was argued, on the part of the defendant, that the plaintiff, by the institution and induction into Ocle Pritchard, had not made Stoke Lacey void, but only voidable; and that the patron might make it void or not, at the election of the patron; and it appeared by the plea, that, after the institution and induction to Ocle Pritchard, the plaintiff had conveyed the advowson of Stoke Lacey to another person. But the Court held, that, by the institution and induction of the plaintiff to the church of Ocle Pritchard, the church of Stoke Lacey had become void, and the plaintiff's title to present to Stoke Lacey had accrued.

This is a decisive authority in support of the plaintiff's answer to the objection of the defendant, and the last plea, therefore, is bad upon both grounds, and there must be judgment for the plaintiff on these demurrers.

Judgment for the plaintiff.

MOSS AND OTHERS v. SMITH AND ANOTHER (1).

(9 C. B. 94—110; S. C. 19 L. J. C. P. 225; 14 Jur. 1003.)

1850.
Jan. 17.

A ship, valued at 12,000*l.*, was insured from Valparaiso to England; the freight, valued at 4,000*l.*, was also insured by a separate policy: the ship, having sailed with a full cargo, consisting of 800 tons of merchandise, was compelled, by stress of weather, to put back to Valparaiso, where the master, finding, upon survey, that, to repair her so as to enable her to bring home the entire cargo, would cost a sum exceeding the value of the freight, though less than the value of the ship when repaired, sold her: Held, not a total loss of either ship or freight. [9 C. B. 94]

ASSUMPSIT on two policies of assurance.

The first count was upon a policy, dated the 4th of May, 1844, for 1,000*l.* upon the ship *Alfred*, valued at 12,000*l.*, at and from her port or ports of loading in the Pacific, not north of Lima, to her port or ports of discharge in the United Kingdom: Averment of a total loss, by perils of the sea.

The second count was upon a policy of the same date for 1,000*l.* on chartered freight in the said ship *Alfred*, valued at 4,000*l.*, at and from Sydney, New South Wales, to all or any port or ports in the Pacific, not north of Lima, to her port or ports of discharge in

(1) See *Angel v. Merchants' Marine Insurance Co.* [1903] 1 K. B. 811, 819, 72 L. J. K. B. 498.—J. G. P.

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the United Kingdom: Averment, that the ship, by the perils and dangers of the sea, &c., became leaky and greatly damaged, and by the said perils and dangers the said ship became wholly lost to the plaintiffs, and never did arrive at her port of discharge; that the plaintiffs thereby lost the freight of the goods on board the said ship; and that thereupon the plaintiffs gave notice of the premises to the defendants, and then, according to the custom of merchants, abandoned and renounced all their interest in the premises to the defendants. Notice of the premises, and demand of payment.

The declaration also contained the common counts.

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The defendants pleaded, amongst other pleas, thirdly, as to so much of the first count as related to the defendants, not having paid or made good the partial loss *and damage, payment into Court of 100*l.*, and no damages *ultrà*. Verification.

Fourthly, as to the residue of the causes of action in the first count, that the ship was not wholly lost; concluding to the country.

Seventhly, as to so much of the second count as related to the defendants' not having paid the partial loss by reason of the said ship, with the said goods on board, being lost, as attached to the said policy, payment into Court of 150*l.*, and no damages *ultrà*. Verification.

Eighthly, as to the residue of the causes of action in the second count mentioned, that the said ship and the said freight were not wholly lost, &c.; concluding to the country.

The plaintiffs joined issue on the fourth and eighth pleas, and replied to the third and seventh, that the plaintiffs had sustained damages to a greater amount, on each policy, than the respective sums paid into Court; whereupon issues were joined.

The cause was tried before Wilde, Ch. J., at the sittings in London after Trinity Term, 1848.

The plaintiffs were mortgagees of the ship *Alfred*, of 716 tons. The defendants were three of the directors of the Marine Insurance Company. The policies were effected on the 4th of May, 1844,—the one upon the ship, valued at 12,000*l.*, the other upon freight, valued at 4,000*l.* The *Alfred*, sailed from London, on the 8th of September, 1843, on a voyage to Australia, and thence to South America, whence she was chartered to bring home a cargo of guano or saltpetre, at a freight of 3*l.* 10*s.* per ton. She arrived, in the beginning of 1844, at a place called Cobaya, on the South American coast, and there, between the 22nd of June and the 4th of July, shipped on board a cargo consisting of 850 tons of guano. On the 2nd of September, she arrived at *Valparaiso, where she took

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on board a quantity of dollars, on freight, and whalebone : and, on the 12th of December (1), she set sail for England. Between the 2nd (2) and the 29th of September, she encountered a great deal of bad weather, and sustained considerable damage. On the 29th she put back, and she arrived at Valparaiso on the 19th of October.

On the 4th of November, the vessel, having been partially unloaded, was surveyed by certain officers of her Majesty's ship *Daphne*, then at Valparaiso. They recommended certain repairs, which they thought would suffice to put the ship in a condition to bring home about 500 tons of her cargo.

Other surveys were had, on the 14th and 20th of November, by the port surveyor and other competent persons, who reported that it was necessary to take out all the cargo, and who estimated the repairs that would be necessary to enable the vessel to proceed to England with her entire cargo, at 11,711 dollars, and the expenses of unloading and reloading at 7,608 dollars, making together 19,319 dollars, or 3,710*l.* 5*s.*, which would exceed the value of the freight, but would be less than the value of the ship when repaired. They further reported, that, seeing the difficulty of raising money at Valparaiso, and of obtaining the necessary workmen and materials to effect the repairs which they judged necessary, it would be for the interest of all concerned to sell the ship and to forward the cargo by other vessels. The ship was accordingly sold, by public auction, on the 10th of April, 1845, for 1,734*l.*, and the cargo was ultimately delivered at Liverpool, by three other vessels, at a freight of 4*l.* 15*s.* and 5*l.* per ton.

The purchaser of the *Alfred* repaired her at an expense of about 240*l.* and sent her, with a cargo of about 600 tons, to Hamburgh, where she arrived on the 16th of October, 1845.

On the part of the plaintiffs, it was insisted : first, that there was a constructive total loss of the ship ; secondly, that, supposing there was not a total loss of the ship, there was, at all events, a total loss of freight, to the extent, at least, of that portion of the cargo which the vessel was incompetent to carry home.

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For the defendants, it was contended that there was no total loss of either ship or freight, and that enough had been paid into Court to cover the average loss, viz. 10 per cent. on the ship, and 15 per cent. on the freight (3).

(1) *Sic.* Should be "September" : see 19 L. J. C. P. p. 226.

(2) *Sic.* An obvious error for "12th."

(3) It was agreed that the sufficiency

of the payment into Court to cover an average loss, should be referred to an arbitrator. And, before the rule came on for argument, the arbitrator decided that enough had been paid in.

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The LORD CHIEF JUSTICE told the jury, that, if, upon the evidence laid before them, they were satisfied that the vessel was damaged, by perils of the sea, to such an extent that she was not susceptible of repair, so as to enable her to perform the voyage, save at an expense which would exceed her value when repaired, regard being had to the facilities for repair, and for raising money for that purpose, at Valparaiso, and the time which would be consumed therein, they must find for the plaintiffs, as for a total loss of the ship; and that, on the other hand, if they thought that the vessel, when properly repaired, would be worth more than the sum expended in such repairs, the plaintiffs would be entitled to recover for an average loss only. And, as to the second count, he told them, that, if they thought the vessel might have been repaired within a reasonable time, so as to be enabled to bring home the whole of the cargo, there had been no loss of any part of the freight: and that, if she might have been repaired so as to be able to bring home a part of the cargo only, the *plaintiffs would be entitled to recover for a partial loss on freight.

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The jury returned a verdict for the defendants.

S. Martin, in the following Term, admitting that the summing up and the finding upon the first count could not be impeached, obtained, as to the second count, a rule *nisi* for a new trial on the ground of misdirection, and that the verdict was against evidence. He contended that the proper question to be submitted to the jury upon the second count, was, whether, under the circumstances in which the vessel was placed at Valparaiso, a prudent owner, uninsured, would have incurred the expense necessary to enable her to bring home her entire cargo. He cited *Doyle v. Dallas* (1), and *Green v. The Royal Exchange Assurance Company* (2).

Sir John Jervis, A.-G. (with whom were *Channell*, Serjt., and *James Wilde*), on a former day in this Term, showed cause:

He submitted, that, it being conceded that the direction of the LORD CHIEF JUSTICE, so far as it related to the first count, and the finding of the jury thereon, that there was no total loss of the ship, could not be impeached, there could be no pretence for saying, as to the second count, that there was a total loss of any part of the freight.

(1) 42 B. R. 758 (1 Moo. & Rob. 48).

(2) 16 B. R. 571 (6 Taunt. 68; 1 Marsh. 447).

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S. Martin, Byles, Serjt., and Barstow, to support the rule :

The ship having sustained sea-damage, and having, in consequence, put back to Valparaiso, and being there found to be incompetent, save at an expense equal to, or exceeding, her value, to be repaired, so as to bring home the cargo she originally had on board, the *jury ought to have been told that that amounted to a constructive total loss, at all events, of that part of the freight which the ship could not be rendered capable of earning. That part of the summing up which related to the first count, was undoubtedly correct, according to *Doyle v. Dallas* (1), and other cases. But the LORD CHIEF JUSTICE incorrectly applied to the freight, the same test as to repairs, which he had applied to the ship. The question is, whether a ship-owner, having no policy on the ship, but having effected an insurance on freight, and the ship sustaining sea-damage to an extent that would require an outlay to repair her, short of her value when repaired, may not say, that his ship has sustained damage to such an extent that no reasonable or prudent man would repair her at the place where she happens to be, for the purpose of earning the particular freight, and so treat the freight as totally lost. Assuming the ship to be worth 8,000*l.*, and that the expense of repairing her so as to enable her to bring home her cargo would be 7,000*l.*, there being a policy on freight for 2,000*l.*, would the owner be bound to expend 7,000*l.* in order to earn the 2,000*l.*? Or, is he not at liberty to say that the freight is totally lost, because, by a peril insured against, he is called upon to incur an expense which no prudent owner uninsured would be justified in incurring?

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(CRESSWELL, J.: Does the underwriter on freight undertake to pay, if the assured acts prudently in declining to earn freight?)

Yes, provided he is prevented from earning it, by a peril insured against.

(MAULE, J.: It must be assumed that a prudent owner would have repaired this ship.)

The true test is, what a prudent owner would have done, if there had been no insurance on freight. In *Green v. The Royal Exchange*.

(1) 42 R. R. 758 (1 Moo. & Rob. 48).

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The true test is, what a prudent owner would have done, if there had been no insurance on freight. In *Green v. The Royal Exchange*.

(1) 42 R. B. 758 (1 Moo. & Rob. 48).

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Assurance Company, it *was held, that, if, pending an insurance on freight, and a cargo shipped, the vessel becomes incapable of bringing the cargo home, the master is bound, or not bound, to repair her, and earn what he can on the homeward voyage, as a salvage for the underwriters on freight, according as a prudent owner, having regard to the state of his ship, but without reference to any insurance on the freight, would or would not pursue that course for his own advantage.

(WILDE, Ch. J. : You make the duty to repair depend upon the amount of the freight. What has the underwriter to do with that ?)

Is the owner bound to do more than an uninsured prudent owner, if he insures freight as well as ship ?

(MAULE, J. : The jury have found here that an uninsured prudent owner would have repaired the ship.)

With reference to the ship only.

(CRESSWELL, J. : Is it competent to the ship-owner to say that he will not expend 600*l.* in the repair of the ship, for the purpose of earning 500*l.* freight, though the ship may be worth 10,000*l.* ?)

Is the owner of goods entitled to call upon the owner of the ship to carry them, if, to enable him so to do, he will have to expend a sum exceeding the amount of the freight ?

(WILDE, Ch. J. : Yes. The test is, what a prudent owner would do ; and that has always been, to repair when the repairs can be effected at an expense less than the value of the ship when repaired.)

If the ship could not be repaired so as to bring home the cargo, except at an amount of expense exceeding the value of the freight, the assured may treat the freight as totally lost, although there may not have been a total loss of the ship.

MAULE, J. :

This is an action upon two policies of assurance, the one upon ship, the other upon freight, from Valparaiso to London. A rule has been obtained for a new trial, on the grounds of misdirection and that *the verdict was against evidence. The verdict of the

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jury negatived a total loss of ship and freight, and also a total loss of part of the freight, no distinction having been made between a total loss of part of the freight, and a partial loss of freight. The jury also, as I understand the verdict, negatived a total loss of part of the freight, other than a loss in respect of the charges incurred with reference to the freight; as to which there was a payment into Court, the sufficiency of which was agreed to be referred to an arbitrator. The questions which were put to the jury, were, whether there was a total loss of the ship, and whether there was a total or a partial loss of the freight. The direction given by the LORD CHIEF JUSTICE to the jury, to enable them to arrive at a satisfactory conclusion, was given with reference to the evidence in the cause. The evidence was, that, in the course of the voyage, the ship had sustained damage, that she had been compelled to put back, that she underwent several surveys, and was ultimately sold, and repaired by the purchasers, and afterwards performed several voyages. The evidence does not seem to have raised any question whether the ship might not have been repaired, at an expense not extravagant. The highest estimate of the probable expense of repairing her so as to have made her capable of bringing home the whole cargo, was, 19,819 dollars: and she was in fact repaired at an expense of 1,248 dollars, so as to be able to carry six hundred tons of cargo to Hamburgh, within three months of the time of sale. It seems difficult to understand how it could, under these circumstances, have been insisted before the jury, that there was a total loss of the ship: and it is not so contended now. It is said, however, that there was a misdirection with regard to the freight, inasmuch as the LORD CHIEF JUSTICE omitted to tell the jury, that, in determining whether or not there was a *total loss of freight, they were to throw out of consideration the value of the ship, and to consider only whether or not a prudent owner, acting with a view to the earning of freight, would have executed the necessary repairs either wholly or in part. It is said, that, if, in a case like the present, a prudent owner, looking at the amount of freight, would not have executed the repairs so as to enable the ship to bring home the whole cargo, there would, at any rate, be a partial loss of freight, or a total loss of part, which would be the same thing; and that, if a prudent owner would not have executed any repairs, so as to enable the ship to bring home any part of the cargo, still, with reference only to the amount of freight, and without reference to the value of the ship, there would be a total

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loss of freight. The LORD CHIEF JUSTICE certainly did not put that proposition to the jury: and, if it was one which he ought to have put to them, the omission on his part so to do, undoubtedly amounts to a misdirection. But I do not agree that that is a correct view of the law upon the subject. The course which would be adopted by a prudent owner, with reference to the value of the ship, or the value of the freight, or with reference to many other considerations, is only introduced in this way: Underwriters are responsible for losses arising from perils of the sea, for such perils as are mentioned in the policy. If the ship is actually lost by a peril of the sea, or any other peril covered by the policy, the assured may call it a total loss. If she sustains damage to such an extent that she cannot be repaired at all, that also is a total loss. It may be that the injury sustained by the ship is irreparable with reference to the place where she is; for instance, the ship may have met with the disaster at a place where no workmen of requisite powers are to be met with, or where the necessary materials are not to be found, so that to

[*103] *repair her there is altogether impracticable: and in such a case the loss would also be a total loss. But, short of that, it may be that it may be physically possible to repair the ship, but at an enormous cost: and there also the loss would be total; for, in matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling, when he has dropped it into deep water; though it might be possible, by some very expensive contrivance, to recover it. So, if a ship sustains such extensive damage, that it would not be reasonably practicable to repair her, seeing that the expense of repairs would be such that no man of common sense would incur the outlay, the ship is said to be totally lost. It is in that way alone that the question as to what a prudent owner would do, arises. However damaged the ship may be, if it be practicable to repair her, so as to enable her to complete the adventure, she is not totally lost. The ordinary measure of prudence which the Courts have adopted, is this, if the ship, when repaired, will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss. Now, in order to constitute a total loss of freight, or, as far as that is in dispute in this case, a partial loss of freight, the loss of freight must have arisen by reason of the total or partial incapacity of the ship to earn

freight. I do not mean to say that there may not be a loss of ship or of freight, in the way which has been put in argument, but they do not arise here; nor is this a loss by charges, which is a common partial loss on freight, the underwriters having actually paid that. But the only loss in question here, is, a loss of freight as incident to the loss of the ship. If the ship was irreparably damaged, considering the *damage to be irreparable in the view I have mentioned, and which I take to be well established, to the extent that she could not bring home any part of the cargo, then that would be a total loss of freight. If the ship was damaged to such an extent only as that she might have been repaired so as to have been able to bring home part of the cargo, but not the whole, then there would be a total loss of that part of the freight which the ship was thus incapacitated from earning. Both these views were submitted by the LORD CHIEF JUSTICE to the jury: he, in substance, told them, that, if they thought the ship could have been prudently and properly repaired, within a reasonable time, and at a reasonable cost, so as to be able to bring home the whole cargo, there had been no loss of any part of the freight; but that, if the ship could have been prudently repaired, so as to bring home a part of the cargo only, but not the whole, then the plaintiffs were entitled to recover as for a partial loss of freight. That seems to me to be perfectly correct. And I can find no authority, nor am I aware of any principle, to support the proposition which it has been insisted by the counsel for the plaintiffs the LORD CHIEF JUSTICE should have submitted to the jury. The shape which that proposition, as I understood it, ultimately took, was this, that a ship sea-damaged might be in such a condition that a prudent owner, uninsured, would repair her, and yet there might be a total loss of freight. Thus, supposing a ship, considered with reference to her own value only, to be worth 10,000*l.*, and to be capable of being repaired, so as to be enabled to bring home the whole cargo, at a cost of 1,000*l.*, that is still to be regarded as a total loss with reference to a policy on freight. That appears to me to involve a pure contradiction. The question is, whether the damage to the ship was repairable or irreparable; if the former, it was not a total loss; if the latter, it was. *The total or partial loss of freight must be incident to the loss of the ship. The difficulties which have been suggested in the course of the argument, seem to me to show that the proposition thus contended for cannot be sustained. No authority has been cited which bears upon the question: and nothing has been urged to induce me to

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conclude that the direction given to the jury, was other than correct.

With respect to the verdict being against evidence, the LORD CHIEF JUSTICE does not report that he is dissatisfied with the conclusion to which the jury came; and I am unable to say that it was wrong. It seems that the ship might have been repaired for a sum not exceeding 10 per cent. on her value. If so, unless some special reason be shown to the contrary, the proper conclusion is obviously that at which the jury have arrived.

CRESSWELL, J. :

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I am entirely of the same opinion. The motion is founded on the count upon the policy on freight; and I shall deal only with that: the other count is disposed of by the finding of the jury, which is not sought to be disturbed. The argument which has been addressed to us upon the subject of the loss of freight, has, as far as I am aware, the merit of being perfectly novel. I never heard of such a thing as a total loss of freight by perils of the sea, because the ship has sustained sea-damage to an amount exceeding the value of the freight. What is the nature of the contract between the ship-owner and the merchant whose goods he contracts to carry on freight? The ship-owner engages to carry the goods from the port of loading to the port of discharge: his contract would be absolute, but for the exception introduced into the bill of lading, unless prevented by perils of the sea. Now, when is the ship-owner said to be prevented by *perils of the sea from fulfilling the contract he has entered into? When the ship is, by a peril of the sea, rendered incapable of performing the voyage. A ship is not rendered incapable of performing the voyage when she is merely damaged to an extent which renders some repairs necessary: if that were so, any the most inconsiderable damage, such as the loss of her rudder, without which she could not proceed, would render her incapable of fulfilling the contract contained in the bill of lading. But, if a ship sustains so much sea-damage that she cannot be repaired, so as to be rendered competent to continue the adventure, then the owner is prevented by a peril of the sea from fulfilling his contract. If the ship is totally destroyed or sunk, the performance of the contract is obviously prevented by a peril of the sea. The courts of law have also engrafted this qualification upon the contract, that, if the damage which results from a peril of the sea, is so great that it cannot be repaired at all, or only at a cost so

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ruinously large that no prudent owner would undertake the repairs, the owner may treat the loss as total, and say that he is prevented by a peril of the sea from performing his contract. Now, what is the contract of the underwriter? That the owner shall not be deprived of his freight by perils of the sea. The jury have in this case found that the ship might have been repaired at an expense such as a prudent owner, uninsured, would have incurred, regard being had to the value of the ship, and that the ship would have been enabled by that expenditure to earn the freight. The owner, then, has not been prevented from earning the freight by a peril of the sea, when, at an expense which it was reasonable for him to incur, he might have earned the freight. I therefore see no reason for disturbing the verdict, on the ground of any supposed misdirection; nor am I able to discover that the jury have come to an erroneous conclusion on the facts.

WILLIAMS, J. :

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I entirely concur in the observations that have fallen from my brothers MAULE and CRESSWELL, though, as I was necessarily absent during a portion of the argument, I abstain from expressing at any length the very strong opinion I entertain upon the main point which has been urged on the part of the plaintiffs. I have heard enough of the case, however, to make me feel satisfied that ample justice will be done between these parties, by discharging this rule, and that a contrary course would be fraught with injustice, and would be alike inconsistent with principle and authority.

WILDE, Ch. J. :

I agree with the rest of the Court in thinking that there is no ground for disturbing this verdict. The points argued at Nisi Prius, were, whether the vessel in question had sustained damage by perils of the sea, and whether the damage so sustained, was so extensive that she could only have been repaired at a cost exceeding her value when repaired. This latter was, as I conceive, very properly negatived by the jury. The question we are now considering, arises upon the count on the policy on freight: and, in discussing this, I apprehend it is perfectly immaterial whether the ship was insured or not. I only advert to the first count, because the summing up was necessarily applicable to both. The jury found that the ship was not damaged to such an extent as to prevent her from earning the freight. The question is, did the jury properly so

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find, as regards the count on freight? The interest in the freight is by law considered incident to the ownership of the vessel. The cases of *Camden v. Anderson* (1) and *Morrison v. Parsons* (2) are distinct authorities for that: and, in this case, the only evidence of interest to maintain the action, was, the evidence of ownership.

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*The question left to the jury being, whether the ship was damaged to such an extent as to prevent her from earning freight, the jury were told, that, if the cost of repairing the vessel, so as to enable her to earn the freight, would exceed her value when repaired, in that case she must be considered to be damaged to an extent to prevent her from earning freight. The jury found that she was not. The plaintiffs now complain that this is a misdirection; insisting, that the proper question to be left to the jury, was, not the extent of the damage, as compared with the value of the ship; but the cost of the repairs, as compared with the value of the freight. Did anybody ever before hear a suggestion that the question of loss or no loss was to be determined with reference, not to the extent of the damage sustained by the ship in relation to her value when repaired, but in relation to the amount of the freight? Can it be said, that, if a valuable ship has a small freight on board, and sustains sea-damage which is capable of being repaired at an expense not exceeding 10 per cent. on her value, the freight is to be said to be totally lost because the cost of repairing the ship exceeds the value of the freight? We are asked, Would any man in his senses spend 1,000*l.* upon the repairs of a ship for the mere purpose of earning 500*l.* freight? To this I answer, certainly not. But this is not the true question. If, by expending 1,000*l.* upon the repairs, he gets, not only 500*l.* freight, but also a ship worth 3,000*l.*, who will for a moment question the prudence of the outlay? Besides, the underwriter has nothing whatever to do with the amount of freight, when considering whether or not there has been a total loss by perils of the sea. The two questions are wholly distinct. The underwriter undertakes to indemnify the owner against a loss of freight by perils of the sea. The law has fixed the meaning of this warranty against sea-damage in such *distinct terms, that, for many years, every contract of insurance has been made with reference to the known and recognised principle, that a ship is prevented from performing her voyage, and consequently from earning freight, when she has sustained damage which can only be

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(1) 5 T. R. 709; 6 T. R. 723; 1 (2) 11 R. R. 622 (2 Taunt. 407).
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repaired at an expense which no prudent owner uninsured would incur; and that is when the outlay will exceed that which he will get by it, viz. when the ship, after the repairs are executed, will not be worth the sum which has been expended upon her. The ship is prevented from earning freight, when she is by a peril of the sea damaged to that extent. The amount of freight, therefore, forms no fair ingredient in the inquiry. The question was left to the jury in terms sufficiently explicit to avoid the possibility of doubt or mistake. They were told, You have before you the evidence on the part of the plaintiffs, of what would have been the cost of the repairs which would have been necessary to enable the ship to pursue the voyage; and you have the evidence, unopposed, of the defendants, as to what was the value of the ship; and, looking at the ship in the condition shown by the plaintiffs' evidence, do you believe that she could have been repaired so as to earn this freight, at an expenditure less than her value, in other words, at an expense which a prudent owner uninsured would incur? The jury say that she might. What possible ground is there to object to the way in which the case was put to the jury, unless it is to be said hereafter, that the underwriter's liability is to be subjected to a new test, viz. whether the ship has sustained damage, by a peril of the sea, to an extent equal to or exceeding the value, not of the ship, but of the freight? That is a test which has never yet been applied: it is one which is entirely unknown to the law, and is equally devoid of principle as it is of authority. The underwriter engages that *the ship shall not by perils of the sea be disabled from performing the voyage: he does not consider whether she may meet with some accident which may entail upon her owner an expenditure exceeding the amount of freight, which may be great or small, but of which he knows nothing. It seems to me that the conclusion the jury came to was correct. It is clear there was no total loss of the ship. The rule must, therefore, be discharged.

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Rule discharged.

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(9 C. B. 110—131; S. C. 19 L. J. C. P. 237; 14 Jur. 312.)

1850.
Jan. 16.

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A., an attorney, holding the offices of clerk of the peace, clerk to the magistrates, clerk to the Commissioners of Land and Assessed Taxes, clerk to the Commissioners of Sewers, clerk to the deputy-lieutenants, steward of certain manors, coroner for a liberty, secretary to a Conservative association, and secretary to a polling district association, entered into articles of partnership with B., by which, after reciting that A. carried on the business

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of an attorney at &c., and held many offices, clerkships, and stewardships of manors, and that it had been agreed that B. should enter into partnership with A. "in the said business, and in the emoluments of the said offices, clerkships, and stewardships," upon the terms thereafter expressed, it was agreed that they should enter into partnership for twenty years, and that "all the profits and emoluments arising from the said offices, clerkships, and stewardships, held by A., as also all such offices, clerkships, and stewardships as should be held by either of them the said A. and B. during the partnership, should be considered as partnership property, and be distributable accordingly: " and the articles contained this further provision, that, if A. should die during the term, then, if, and during such period or periods as, it should happen that no son of A. should be a partner in the said business, B. should be interested in one moiety of the said partnership business, and the executors or administrators of A. should be entitled to the profits of the remaining moiety thereof, to be applied by them as part of his personal estate:

Held, that the contract was not void, as being a contract for the sale of an office, either within the Sale of Offices Act, 1551 (5 & 6 Edw. VI. c. 16), or within the Sale of Offices Act, 1809 (49 Geo. III. c. 126).

And that the latter clause was no violation of the 22 Geo. II. c. 46, s. 11 (1).

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THE following case was, by order of Vice-Chancellor KNIGHT BRUCE, sent for the opinion of this Court: The plaintiff, Frances Sterry, is the widow and sole executrix of Wasey Sterry, gentleman, deceased, who had, for many years previous to and at the time of the making and entering into the articles of partnership hereinafter set out, carried on the business of an attorney and solicitor, at Romford, in the county of Essex, and who, during that time, held many lucrative offices and appointments, that is to say, clerk of the peace for the liberty of Havering-atte-Bower, in the county of Essex, clerk to the Commissioners of Land and Assessed Taxes for the same liberty, clerk to the Commissioners of Sewers for the Levels of Havering, clerk to the magistrates for the half-hundred of Beacontree (Ilford division), in the same county, clerk to the Commissioners of Land and Assessed Taxes for the same half-hundred, clerk to the deputy-lieutenants of the subdivision of Ilford, in the same county, steward of the manors of Barking, Cockermouth, &c., in the same county, coroner for the said liberty of Havering-atte-Bower, secretary to the Essex Conservative association, and secretary to the Romford polling district association.

In 1841, the said Wasey Sterry being willing to admit the defendant into partnership with him in his said business, a partnership was formed between them, upon the terms contained in the following articles of partnership, under seal, duly executed by both parties:

(1) Repealed by S. L. R. Act, 1871. See now s. 32 of the Solicitors Act, 1843 (55 & 56 Vict. c. 73).—J. G. P.

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"Articles of agreement, made, on &c., between Wasey Sterry, of &c., and William Henry Clifton, of &c.: Whereas the said Wasey Sterry hath for many years carried on the business of an attorney and solicitor, and still carries on the same, at his offices at Romford, in the said county, &c.; and he holds many offices, clerkships, and stewardships of manors: And whereas it has been agreed between the said Wasey Sterry and the said William Henry Clifton, that he the *said William Henry Clifton shall enter into partnership with the said Wasey Sterry, in the said business, and in the emoluments of the said offices, clerkships, and stewardships, upon the terms hereinafter expressed: Now, these presents witness, and it is hereby agreed and declared by and between the said Wasey Sterry and the said William Henry Clifton, that they shall enter into such partnership on the day of the date of these presents, under the firm or style of Sterry and Clifton, and that such partnership shall continue for twenty years from that time, subject to the provisions hereinafter contained; and, further, that all the profits and emoluments arising from the said offices, clerkships, and stewardships, held by the said Wasey Sterry as aforesaid, and also all such offices, clerkships, and stewardships as shall be held by either of them, the said Wasey Sterry and William Henry Clifton, during the said partnership, shall be considered as partnership property, and be distributed accordingly; and, further, that the said partnership shall be carried on at the present offices at Romford; and that, during the said partnership, the said William Henry Clifton shall reside at Romford, or within four miles thereof, and the said Wasey Sterry shall reside at Upminster, or within four miles of Romford; with liberty, nevertheless, for the said Wasey Sterry to be absent altogether from the said business and such residence, for any period or periods he may think necessary, in each year, but, in addition thereto, to take occasional holidays. (It was then provided that Sterry should have three fifths, and Clifton two fifths, of the partnership and profits; and that Sterry's sons should be introduced as partners, upon certain terms. The articles then proceeded as follows:) That, in the event of the retirement of Wasey Sterry from the partnership, and also in the event of the said Wasey Sterry's death, and of all or *any of his sons being taken into partnership by the said William Henry Clifton, without having been appointed a partner or partners by the said Wasey Sterry, then, and in either of such cases, if and whilst two or more of the said sons shall be partners in the said business, the said William

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Henry Clifton shall continue to be interested in two fifth parts thereof; but, if and whilst one of the said sons only shall be a partner, the said William Henry Clifton and such one shall be interested in the said partnership business, in equal shares: and that, "if the said Wasey Sterry shall die during the said partnership term of twenty years, then, if, and during such period or periods as, it shall happen that no son of the said Wasey Sterry shall be a partner in the said business, the said William Henry Clifton shall be interested in one moiety of the said partnership business, and the executors or administrators of the said Wasey Sterry shall be entitled to the profits of the remaining moiety thereof, to be applied by them as part of his personal estate. In witness," &c.

From the day of the date of the above articles of partnership, up to and at the time of the death of the said Wasey Sterry, the said Wasey Sterry and the defendant continued in partnership together, on the above terms.

The said Wasey Sterry died on the 15th of July, 1842, having previously duly made and published his last will and testament in writing, and thereby appointed the plaintiff, Frances Sterry, sole executrix thereof, who afterwards duly proved the same.

The questions for the opinion of the Court are: first, whether the said articles of partnership are or are not void in law; secondly, if not, whether the particular clause or provision in such articles, beginning with the words "If the said Wasey Sterry shall die during the partnership term of twenty years," and ending *with the words "as part of his personal estate," is or is not void in law.

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Peacock (with whom was *Channell*, Serjt.), for the plaintiff:

There is no pretence for saying that the deed, or any portion of it, is void. When the parties were before Vice-Chancellor Knight Bruce, it was insisted, on the part of the defendant, that the clause referred to in the second question was rendered illegal by the 11th section of the 22 Geo. II. c. 46 (1), its effect being that

(1) That section recited that "whereas divers persons who are not examined, sworn, or admitted to act as attorneys or solicitors in any court of law or equity, do, in conjunction with, or by the assistance or connivance of certain sworn attorneys and solicitors, and by various subtle contrivances, intrude themselves into,

and act and practise in, the office and business of attorneys and solicitors, to the great prejudice and loss of many of his Majesty's subjects, and the scandal of the profession of the law," and enacted, "that, if any sworn attorney or solicitor shall act as agent for any person or persons not duly qualified to act as an attorney or

Clifton should allow his name to be used for the benefit of unqualified persons, viz. the executors or administrators of Wasey Sterry. The VICE-CHANCELLOR intimated an opinion that the deed did not fall within *the Act of Parliament, but gave the parties an opportunity to raise the question before a court of law. Two cases have been decided upon this statute, *Tench v. Roberts* (1), and *Candler v. Candler* (2). In the former, the agreement was, to allow an unqualified person, viz. the defendant's clerk, a share of the profits of the business, in lieu of a salary; and this was held to constitute a partnership, and therefore to be within the statute. But, in *Candler v. Candler*, where an attorney had died, and bequeathed all his property to his widow, and his eldest son, for the mixed consideration of the goodwill of the business, the advancement of money for carrying it on, and family affection, entered into an agreement with his mother to continue the business, and to account to her for a moiety of the profits during the minority of his younger brothers and sisters,—this arrangement was held to be not contrary to the policy of the statute. The VICE-CHANCELLOR (Sir JOHN LEACH) there says: "It appears by the preamble to this clause (3), that the mischief which the Legislature had in view, was, that unqualified persons, by the assistance or connivance of regular attorneys, were enabled to act and practise as attorneys, to the prejudice of his Majesty's subjects, and the scandal of the profession. When, therefore, it is provided that an attorney shall not permit or suffer his name to be in any way made use of upon the account or for the profit of any unqualified person, the plain purpose is, that he shall not by any shift or contrivance enable an unqualified person to act or practise in his name. The deed in question does

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solicitor as aforesaid, or permit or suffer his name to be any ways made use of upon the account, or for the profit, of any unqualified person or persons, or send any process to such unqualified person or persons, thereby to enable him or them to appear, act, or practise in any respect as an attorney or solicitor, knowing him not to be duly qualified as aforesaid, and complaint shall be made thereof in a summary way to the Court from whence any such process did issue, and proof made thereof, upon oath, to the satisfaction of the Court, that such sworn attorney or solicitor hath offended therein as aforesaid; then and in such case every

such attorney or solicitor so offending shall be struck off the roll, and for ever after disabled from practising as an attorney or solicitor; and, in that case, and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the said Court to commit such unqualified person so acting or practising as aforesaid, to the prison of the said Court, for any time not exceeding one year."

(1) 6 Madd. 145 (a).

(2) 6 Madd. 141; *S. C.* upon motion to dissolve the injunction, Jac. 225; see 23 B. R. 34.

(3) 22 Geo. II. c. 46, s. 11.

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not enable any unqualified person in any manner to act or practise as an attorney. It is simply a grant of a moiety of the profits made by the sole acting of the *attorney himself during a certain period, for the mixed consideration of the goodwill of the business, the advance of money, and family affection, and is neither within the mischief nor the words of the statute. In the case of *Tench v. Roberts*, which was before me, on demurrer, on the 18th of May, 1819, the plaintiff, who was not an attorney, but described himself as a writer, entered into an agreement with the defendant, who was an attorney, to become an assistant to him in his business, on condition that he received one third of the profits, in lieu of salary, but not to be considered as a partner: I held, that, in point of law, this was a partnership, and that, by the necessary effect of this agreement, Tench, an unqualified person, was enabled to act or practise as an attorney, and to use the name of Roberts upon his account, and for his profit." In *Bunn v. Guy* (1), a contract entered into by a practising attorney, to relinquish his business, and recommend his clients to two other attorneys, for a valuable consideration, and that he would not himself practise in such business within certain limits, and would permit them to make use of his name in their firm for a certain time, but without his interference, &c., was held to be valid in law. The Notaries Act, 41 Geo. III. c. 79, s. 10, *makes express provision for allowances to widows and children of deceased partners; this was necessary, the language of the two Acts being essentially different, *Jackson and Wood, In re* (2), and *Williams v. Jones* (3), which were cited in equity, are distinguishable upon the same ground as *Tench v. Roberts*, viz. that, in both, the agreement was that the attorney's name should be used for the profit of an unqualified person.

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Willes (with whom were *Cowling* and *Joliffe*), for the defendant :

The articles of partnership in this case are illegal and void, upon two grounds,—first, that they relate to an illegal sale of an office within the 5 & 6 Edw. VI. c. 16, ss. 2, 3, and the 49 Geo. III. c. 126, ss. 1, 3,—secondly, that the last clause is in express contravention of the statute 22 Geo. II. c. 46, s. 11.

1. By the first of these statutes, it is, "for the avoiding of corruption which may hereafter happen to be in the officers and

(1) 7 R. R. 560 (4 East, 190; 1 N. P. C. 443.
Smith, 1).

(3) 29 R. R. 181 (5 B. & C. 108 ;

(2) 1 B. & C. 270; and see 2 Stark. 7 Dowl. & Ry. 548).

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ministers in those Courts, places, or rooms, wherein there is requisite to be had the true administration of justice or services of trust, and to the intent that persons worthy and meet to be advanced to the place where justice is to be ministered, or any service of trust executed, should hereafter be preferred to the same, and no other," enacted, "that, if any person or persons at any time hereafter bargain or sell any office or offices, or deputation of any office or offices, or any part or parcel of any of them, or receive, have, or take any money, fee, reward, or any other profit, directly or indirectly, or take any promise, agreement, covenant, bond, or any assurance to receive or have any money, fee, reward, or other profit, directly or indirectly, for any office or offices, or for the deputation *of any office or offices, or any part of them, or to the intent that any person should have, exercise, or enjoy any office or offices, or the deputation of any office or offices, or any part of any of them, which office or offices, or any part or parcel of them, shall in any wise touch or concern the administration or execution of justice, or the receipt, controlment, or payment of any of the King's Highness's treasure, money, rent, revenue, account, aulnage, auditorship, or surveying of any of the King's Majesty's honours, castles, manors, lands, tenements, woods, or hereditaments, or any of the King's Majesty's Customs, or any other administration or necessary attendance to be had, done, or executed, in any of the King's Majesty's Custom-house or houses, or the keeping of any of the King's Majesty's towns, castles, or fortresses, being used, occupied, or appointed for a place of strength and defence, or which shall concern or touch any clerkship to be occupied in any manner of court of record wherein justice is to be ministered,—that then all and every such person and persons that shall so bargain or sell any of the said office or offices, deputation or deputations, or that shall take any money, fee, reward, or profit for any of the said office or offices, deputation or deputations of any of the said offices, or any part of any of them, or that shall take any promise, covenant, bond, or assurance for any money, reward, or profit, to be given for any of the said office or offices, deputation or deputations of any of the said office or offices, or any part of any of them, shall not only lose and forfeit all his and their right, interest, and estate which such person or persons shall then have, of, in, or to any of the said office or offices, deputation or deputations, or any part of any of them, or of, in, or to the gift or nomination of any of the said office or offices, deputation or deputations, for the which office or offices, or for the

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deputation or deputations of which office or *offices, or for any part of any of them, any such person or persons shall so make any bargain or sale, or take or receive any sum of money, fee, reward, or profit, or any promise, covenant, or assurance to have or receive any fee, reward, money, or profit; but also that all and every such person or persons that shall give or pay any sum of money, reward, or fee, or shall make any promise, agreement, bond, or assurance for any of the said offices, or for the deputation or deputations of any of the said office or offices, or any part of any of them, shall, immediately by and upon the same fee, money, or reward given or paid, or upon any such promise, covenant, bond, or agreement had or made for any fee, sum of money, or reward to be paid as is aforesaid, be adjudged a disabled person in law, to all intents and purposes, to have, occupy, or enjoy the said office or offices, deputation or deputations, or any part of any of them, for the which such person or persons shall so give or pay any sum of money, fee, or reward, or make any promise, covenant, bond, or other assurance to give or pay any sum of money, fee, or reward." The 1st section of the 49 Geo. III. c. 126, extends the provisions of the former Act to "all offices in the gift of the Crown, or of any office appointed by the Crown, and all commissions, civil, naval, or military, and to all places and employments, and to all deputations to any such offices, or commissions, places, or employments in the respective departments or offices, or under the appointment or superintendence and control of the Lord High Treasurer or Commissioners of the Treasury, the Secretary of State, the Lords Commissioners for executing the office of Lord High Admiral, the master-general and principal officers of his Majesty's Ordnance, the Commander-in-Chief, the Secretary at War, the paymaster-general of his Majesty's forces, the Commissioners for the Affairs of India, the Commissioners of the Excise, the treasurer of the navy, *the Commissioners of the Navy, the Commissioners for Victualling, the Commissioners of Transports, the commissary-general, the store-keeper-general, and also the principal officers of any other public department or office of his Majesty's Government in any part of the United Kingdom, or in any of his Majesty's dominions, colonies, or plantations which now belong or may hereafter belong to his Majesty; and also to all offices, commissions, places, and employments belonging to, or under the appointment or control of the United Company of Merchants of England trading to the East Indies." And the 3rd section enacts, "that, if any person or

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persons shall sell or bargain for the sale of, or receive, have, or take any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, or any promise, agreement, covenant, contract, bond, or assurance, or shall, by any way, device, or means, contract or agree to receive or have any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, and also if any person or persons shall purchase, or bargain for the purchase of, or give or pay any money, fee, gratuity, loan of money, reward, or profit, or make or enter into any promise, agreement, covenant, contract, bond, or assurance to give or pay any money, fee, gratuity, loan of money, reward, or profit, or shall, by any way, means, or device, contract or agree to give or pay any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, for any office, commission, place, or employment specified or described in the said recited Act or this Act, or within the true intent or meaning of the said Act, or this Act, or for any deputation thereto, or for any part, parcel, or participation of the profits thereof, or for any appointment or nomination thereto, or resignation thereof, or for the consent or consents, or voice or voices of any person or persons to any such appointment, nomination, *or resignation, then and in every such case, every such person, and also every person who shall wilfully and knowingly aid, abet, or assist such person therein, shall be deemed and adjudged guilty of a misdemeanor." The articles of partnership in this case recite that Sterry carried on the business of an attorney, and held many offices, clerkships, and stewardships of manors, and that it had been agreed between him and Clifton that the latter should enter into partnership with him in the said business, and in the emoluments of the said offices, clerkships, and stewardships; and the case enumerates the offices and stewardships to which the agreement has reference. If any one of the offices so enumerated be within the statutes, the agreement is one which cannot be carried into effect. Now, the office of clerk of the peace, of clerk to the Commissioners of Land and Assessed Taxes, of clerk to the Commissioners of Sewers, and of clerk to the magistrates, are all offices which "touch or concern the administration or execution of justice." In *Hopkins v. Prescott* (1), an agreement whereby, after reciting that A. had carried on the business of a law-stationer at G., and also had been sub-distributor of stamps, collector of assessed taxes, &c., there, and that he had agreed with B. for the sale of

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the said business, and of all his goodwill and interest therein, to him, for the sum of 300*l.*, A., in consideration of the said sum of 300*l.*, agreed to sell, and B. agreed to purchase, the said business of a law-stationer at G., and whereby it was further agreed that A. should not at any time after the 1st of March then next, carry on the business of a law-stationer at G., or within ten miles thereof, or collect any of the assessed taxes, &c., but would use his utmost endeavours to introduce B. to the said business and offices; was *held to be illegal and void, as being a contract for the sale of an office, within the 5 & 6 Edw. VI. c. 16, and also within the 49 Geo. III. c. 126. WILDE, Ch. J. there says: "The subject-matter of the agreement, in addition to the sale of the business of a law-stationer, is, that the plaintiff will, for certain reward, resign the offices of collector of assessed taxes and sub-distributor of stamps, and use his best endeavours to procure the defendant to be appointed to those offices. The question is, whether these are offices within the statute 5 & 6 Edw. VI. c. 16. It is said that the Court cannot take notice of the office of 'collector of assessed taxes.' He is, however, an officer appointed, under certain Acts of Parliament, of which we must take notice, to an office connected with the receipt of the revenue. The office of sub-distributor of stamps, likewise, is an office of the same description. Both are within the 5 & 6 Edw. VI. c. 16, the 3rd section of which avoids all contracts for the sale or purchase of the several offices mentioned in the 2nd section. We need not, therefore, look beyond the provisions of that statute, to see that the contract declared on in this case cannot be made the foundation of an action. The 49 Geo. III. c. 126, s. 3, however, carries the matter still further, by making the transactions prohibited by the statute of Edward, misdemeanors. The effect of both statutes, is, that this agreement is utterly void."

(WILLIAMS, J.: The statute 5 & 6 Edw. VI. c. 16, contemplates that the person who pays the money is to enjoy the office, or part of it.)

Dr. Trevor's case (1) shows that a large and liberal construction is to be given to the statute, to suppress the mischief which it was designed to remedy. In *Palmer v. Bate* (2), the office of clerk of the peace was held to *be within the statute 5 & 6 Edw. IV. c. 16.

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(1) 12 Co. Rep. 78 (a).

(2) 23 R. R. 535 (2 Brod. & B. 673 ;
 6 Moore, 28).

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The office of clerk to the Commissioners of Sewers, who are a court of record (1), is equally within the statute. So also is that of clerk to the magistrates: it is clearly an office connected with the administration of justice; its nature is discussed in *Ex parte Sandys* (2); and it is an office that is recognised in the statutes 26 Geo. III. c. 14, 6 Geo. IV. c. 50, s. 10, and 9 Geo. IV. c. 61, s. 15. The office of coroner is within the provisions of the statute 5 & 6 Edw. VI. c. 16 (3). So also is that of clerk to the Land and Assessed Tax Commissioners, the duties of whose office are regulated by the 43 Geo. III. c. 99, s. 9, and 3 Geo. IV. c. 88, s. 6. And *Hopkins v. Prescott* shows that it is immaterial that the office was unknown at the time of the passing of the statute of 5 & 6 Edw. VI. c. 16. The office of clerk to the deputy-lieutenants of the sub-division of Ilford, is probably a military, rather than a judicial office, and may not be within the statute of Edward; though it might still be within the 49 Geo. III. c. 126.

(MAULE, J.: It is not necessary to give effect to all the words in the deed: some of the offices that are mentioned clearly are not within the statute; stewardships of manors, for instance.)

The agreement evidently contemplates the assignment of the profits of all the offices mentioned in the case; and, if any one of them cannot legally be assigned, the contract is altogether void. It is difficult to say that the stewardship of a manor, which is an office partly ministerial and partly judicial (4), is not within the statute.

(MAULE, J.: Have you any express authority for that?)

In *Williamson v. Barnsley* (5), the *office of steward of a court-leet or court-baron was held to be within the statute. In *Godolphin v. Tudor* (6), it was held, that, if a person hold an auditor's office for life, and depute another to exercise the said office during his good behaviour, a bond given by such deputy to pay his principal yearly, during the said deputation, 200*l.*, and that, in consideration thereof, the deputy shall have all the rents and profits of the said office to

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(1) See Fitz. Nat. Brev. 113; Com. 4th ed. p. 116; *Reg. v. The Lord Dig. Justices* (G. 3); Callis on Sewers, 163—167; 4 Wentw. Pl. 191; *Ramsey v. Nornabel*, 11 Ad. & El. 383.

(2) 4 B. & Ad. 863.

(3) See Hawk. P. C. ch. 9, § 1.

(4) See 1 Scriven on Copyholds,

of the Manor of Old Hall, 10 Ad. & El. 248.

(5) 1 Brownl. & G. 70.

(6) 6 Mod. 234; 2 Salk. 468; Willes, 375 (*f*); affirmed in the House of Lords, 1 Br. P. C. 101 (135).

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his own use, is void by the statute 5 & 6 Edw. VI. c. 16, for, it is a bond to pay a certain sum at all events. This is not a mere case of giving a portion of the profits of an office to a deputy.

(CRESSWELL, J. : Do you contend that this would have been a void bargain within the statute of Edward, independently of the 49 Geo. III. c. 126 ?)

It is submitted that it does come within the statute of Edward ; but, at all events, it is within the 3rd section of the 49 Geo. III. c. 126. The cases of *Farty v. Odium*(1) and *Wells v. Foster* (2), show the extreme jealousy of the common law upon the subject of assignments of offices or profits of offices : and the statute 5 & 6 Edw. VI. c. 16, must be taken to enact what was the common law before, with an additional penalty. It may be said that there is nothing in these articles of partnership to entitle Clifton to a portion of the profits of any offices held by Sterry, the sale of which would be illegal. But general words are used, which, if found in a will, would suffice to pass all the party had. Would one or two offices satisfy the words "many offices?"

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2. Upon the other question, whether the agreement in this case comes within the 22 Geo. II. c. 46, s. 11, the Court will have to elect between the opinions of *Lord ELDON and Sir JOHN LEACH in *Candler v. Candler* (3), and that of Lord TENTERDEN, in *Jackson, In re* (4). In the former case, however, it is to be observed, there was no ultimate judgment ; the matter appears to have been compromised. In *Jackson, In re*, an attorney had engaged a certificated conveyancer to conduct his business, and agreed to allow him a moiety of the profits, instead of a salary : and ABBOTT, Ch. J., said : " I am clearly of opinion that this is a case both within the spirit and the words of the statute. The enacting part must be construed with reference to the mischief recited in the preamble. That mischief was, that persons not admitted as attorneys, did, by the connivance of attorneys, intrude themselves into, and act and practise in, the office and business of attorneys. Now, here, Wood, who is not an admitted attorney, was enabled, by the connivance of Jackson, to intrude himself into, and act and practise in, the office and business of an attorney. This is a case clearly, therefore, within the mischief which it was the object of the statute to remedy.

(1) 1 R. R. 791 (3 T. R. 681).

(2) 58 R. R. 650 (8 M. & W. 149).

(3) Jac. 225 ; 6 Madd. 141.

(4) 1 B. & C. 270.

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The statute then proceeds to enact, 'that, if any sworn attorney shall act as agent for any person not duly qualified to act as an attorney, or permit his name to be in any wise made use of, for the account or profit of any unqualified person, or send any process to such unqualified person, thereby to enable him to appear, act, or practise in any respect as an attorney, the attorney so offending shall be struck off the roll, and for ever after disabled from practice.' Now, here, Jackson permitted his name to be made use of upon the account and for the profit of Wood. It is, therefore, a case within the words of the enacting part of the clause. It has been urged that, to bring the case within the Act, *it must have been done for the purpose of enabling an unqualified person to act as an attorney. I am of opinion the word 'thereby' applies merely to the sending of process to the unqualified person, and not to the whole of the preceding sentence."

(WILLIAMS, J.: The decision there proceeded upon the ground that the case fell within the mischief recited in the preamble to the 11th section.)

Where the enacting part of a statute is clear, it is not to be controlled by the words of the preamble. This is clearly laid down by POLLOCK, C. B., in delivering the judgment of the Court of Exchequer, in *Salkeld v. Johnson* (1): "Although," he says, "the title has occasionally been referred to as aiding in the construction of an Act (particularly by Sir JOHN NICHOLL, in *Brett v. Brett* (2)), it is certainly no part of the law, and, in strictness, ought not to be taken into consideration at all: Lord COKE, *Powtler's case* (3); Lord HOLT, *Wells and Wilkins* (4); Lord MANSFIELD, *Rex v. Williams* (5); and Lord HARDWICKE, *The Attorney-General v. Lord Weymouth* (6). But the preamble is undoubtedly a part of the Act, and may be used to explain it, and is, as Lord COKE says (7), 'a key to open the meaning of the makers of the Act, and the mischiefs it was intended to remedy;' but, on the other hand, although it may explain, it cannot control the enacting part, which may, and often does, go beyond the preamble."

(WILLIAMS, J.: The clear words of the enacting part certainly are not to be controlled by the language of the preamble.)

(1) 2 Ex. 282, 283.

(2) 3 Addams, 210.

(3) 11 Co. Rep. 33.

(4) 6 Mod. 62.

(5) 1 W. Bl. 95.

(6) Amb. 22.

(7) 4 Inst. 330.

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Peacock, in reply :

This is not a contract for the sale of an office, or of part of an office, within the meaning of the statutes.

[*127] (MAULE, J. : I doubt whether *the case ought not to have stated, as a fact, that the parties contracted with reference to all the offices referred to, or some of them. Upon the case as it stands, the question is, whether there is evidence from which we can infer that they did intend to include these offices.)

The obvious meaning of the contract is, that Sterry conveys to Clifton, so far as it may be legal so to do, an interest in the offices or appointments which he held. In *Harrington v. Klopprogge* (1), it was held that an assignment of the profits of all offices which the defendant might acquire, is legal ; as it will be taken to mean, of all offices which may be legally assigned. Assuming that the agreement in this case affects to deal with the office of clerk of the peace, and that that is an office within the statute, still, it is submitted, the contract is not illegal. There is no portion of the fees of that or of any of the other offices, that Sterry has agreed to assign to Clifton. In *Aston v. Gwinnell* (2), where it was held that the office of clerk to the deputy registrar in the Prerogative Court of Canterbury, is not an office connected with the administration of justice, within the meaning of the statute 5 & 6 Edw. VI. c. 16, so as to prevent its being aliened or charged ; nor is an alienation of or charge on the profits of the office, contrary to the policy of the law restricting the alienation of the income of a public officer, Lord Chief Baron ALEXANDER makes a distinction between the sale of an office, and an assignment of the profits. “It is then objected,” he says (3), “to the part of the prayer respecting the profits of the office, that the contract is void by the statute of 5 & 6 Edw. VI. c. 16. I am not able to perceive the bearing of this Act upon the present question. The object of that law was, to prohibit corrupt contracts, by which a right to an office, or a right *to exercise any of its duties, might be obtained, with a view that persons worthy of such trusts might be advanced to them. This contract seems to me to have no relation to that subject. Forgetting, for the moment, that this is a mere clerkship held during the pleasure of the chief officer, I cannot avoid recollecting that the appointment, or any

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(1) 23 R. R. 539, n. (2 Brod. & B.
678 (a) ; 6 Moore, 38 (a)).

(2) 3 Y. & J. 136.
(3) *Ib.* 148.

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influence used or to be used for the purpose of obtaining it, is quite remote from this transaction. I cannot, therefore, apply any argument drawn from that statute, to the point now under my consideration. Another class of cases has been, with more plausibility, applied to this controversy. I allude to that class which is founded on principles of State policy, and which protects the servants of the public from their own improvidence, and secures to them, in defiance of their own acts, the possession of those resources derived from the public, and intended to enable them to perform their public functions. The pay of naval and military officers, and their incapacity to assign it either at law or in equity, after some hesitation, at last established, affords the most distinct and intelligible instance of the application of this rule. The office, or rather the profits of the office, of clerk of the peace, seems another instance of the same character. But I am not able to apply that principle to the situation of the defendant Askew. His situation is called an office; but its nature is not very distinctly explained. This, however, is represented, that he is a mere clerk, assisting the deputy-registrars, receiving emolument for business done, at the pleasure of his superiors. It does not appear to me that he can be considered as an officer of the Court. And, as to his connection with the actual execution of any function in the Prerogative Court, there is none. It is confined to receiving, during the pleasure of his superiors, certain sums earned by the labours of another person permitted actually to perform *there these functions." *Layng v. Paine* (1) was the case of an actual sale of an office. In *Gulliford v. De Cardonell* (2), and in *Godolphin v. Tudor*, a bond given by a deputy to the principal, to pay him half the profits, or a certain sum out of the salary or profits, of the office, was held good. *Hopkins v. Prescott* was the case of an agreement that was clearly illegal, within the rule laid down in Co. Litt. 294 a, and 3 Inst. 154. The deed now in question, was not intended to operate, nor did it operate, as an assignment of the offices, or any part of them. Even, therefore, supposing the Court should incline to hold the deed to be illegal if intended to convey part of the profits of any offices which the parties could not legally deal with, will they, without any evidence upon the subject, assume that the parties did so intend? In Co. Litt. 42 a, it is said: "A tenant in fee-simple makes a lease of lands to B., to have and to hold to B. for term of life, without mentioning for whose life it shall be, it shall be deemed for term of the life of the lessee; for,

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(1) Willes, 571.

(2) 2 Salk. 466.

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it shall be taken most strongly against the lessor; and, as hath been said, an estate for a man's own life is higher than for the life of another. But, if tenant in tail make such a lease, without expressing for whose life, this shall be taken but for the life of the lessor, for two reasons,—first, when the construction of any act is left to the law, the law, which abhorreth injury and wrong, will never so construe it as it shall work a wrong: and, in this case, if, by construction, it should be for the life of the lessee, then should the estate-tail be discontinued, and a new reversion gained by wrong; but, if it be construed for the life of the tenant in tail, then no wrong is wrought. And it is a general rule, that, whensoever the words of a deed, or of the parties without *deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law, shall be taken," &c. In Bacon's Maxims (1), it is said: "It is a rule that Kings' grants shall not be taken or construed to a special intent: it is not so with the grants of a common person, for, they shall be extended as well to a foreign intent as to a common intent; yet with this exception, that they shall never be taken to an impertinent or repugnant intent: for, all words, whether they be in deeds or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter or person." Here, notwithstanding the general words of the recital, the operation of the deed must be limited to those offices the profits of which could be legally dealt with. There is no authority for saying that the office of clerk to the magistrates, clerk to Assessed Tax Commissioners, or clerk to Commissioners of Sewers, is an office touching or concerning the administration of justice, any more than that of clerk to a Judge of one of the superior Courts. The stewardship of a court-leet was held, in *Williamson v. Barnsley*, to be an office within the 5 & 6 Edw. VI. c. 16; but there are many manors that have no courts-leet. The duties of the steward of a manor are in no respect judicial: Com. Dig. Copyhold (R. 5), (R. 6).

(WILDE, Ch. J.: A court-baron is incident to every manor: Co. Litt. 58. And the steward presiding in a court-baron has been held to be a judicial officer: *Holroyd v. Breare* (2); *Bradley v. Carr* (3); *Brown v. Gill* (4).)

(1) Reg. 10. *Verba generalia restringuntur ad habilitatem rei vel personæ.*

(2) 21 R. R. 361 (2 B. & Ald. 473).

(3) 3 Man. & G. 221; 3 Scott, N. R. 521. *A fortiori*, when holding a customary court.

(4) 69 R. R. 629 (2 C. B. 861).

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As to the last clause, the construction put by Sir JOHN LEACH and by Lord ELDON upon the statute 22 Geo. II. c. 46, s. 11, in *Candler v. Candler*, is clearly the correct one, viz. that the meaning of the clause, is, that *qualified persons should not permit their names to be used by others, so as to enable them to appear as attorneys. The true rule for the construction of Acts of Parliament, is that given by TINDAL, Ch. J., in *The Sussex Peerage* case (1), "The only rule for the construction of Acts of Parliament, is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law-giver. But, if any doubt arises from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice DYER (2), is a 'key to open the minds of the makers of the Act, and the mischiefs which they intended to redress.'" The intention of the framers of this Act, it is submitted, will be best carried into effect in this case, by holding that the clause in question was not illegal.

Cur. adv. vult.

The following Certificate was afterwards sent to the Vice-Chancellor:

"This case has been argued before us by counsel; we have considered it, and are of opinion that the articles of partnership set forth, are not void in law.

"Secondly, we are of opinion that the particular clause therein mentioned, is not void in law.

"THOS. WILDE.

"W. H. MAULE.

"C. CRESSWELL.

"E. V. WILLIAMS."

(1) 65 B. R. 11 (11 Cl. & Fin. 143). (2) *Stowel v. Lord Zouch*, Plowden, 369.

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(9 C. B. 173—198.)

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Satisfaction of a bill as between a drawer or indorser and an indorsee, whether before or after the bill becomes due, does not necessarily enure as a satisfaction on behalf of the acceptor, or operate to discharge him from liability to the indorsee.

To a count on a bill of exchange for 49*l.*, by indorsees against acceptor, the latter pleaded, that, after the indorsement, and before the commencement of the action, the drawer delivered to the plaintiffs, and the plaintiffs accepted, goods of the value of 50*l.*, in satisfaction and discharge of the bill, and of all damages and causes of action in respect thereof; and that the plaintiffs, from the time of the said satisfaction of the bill, had always held the same against the will and consent of the drawer, and so still held the same; and that the plaintiffs had commenced the action, and prosecuted the same, against, and in opposition to, the will and consent of the drawer :

Held, after verdict for the defendant, that the plea was no bar to the plaintiffs' right to recover against the defendant on the bill (1).

ASSUMPSIT on a bill of exchange, by indorsees against acceptor.

The declaration charged the defendant as the acceptor of a bill for 49*l.*, drawn by Messrs. W. and C. Cook, payable to order, at three months after date, and indorsed by W. and C. Cook to the plaintiffs.

The fourth plea stated, that, after the indorsement of the bill to the plaintiffs, and before the commencement of the action, W. and C. Cook, the drawers of the bill, had delivered to the plaintiffs, and the plaintiffs had accepted, divers goods of great value, to wit, of the value of 50*l.*, in full satisfaction and discharge of the said bill of exchange, and of all damages and causes of action in respect thereof; and that the plaintiffs, from the time of the said satisfaction of the said bill of exchange, hitherto, had always held the same against the will and consent of the said drawers, and so still held the same; and that the plaintiffs commenced this action, and still prosecuted the same, against, and in opposition to, the will and consent of the said drawers.

To this plea, the plaintiffs replied *de injuriâ*.

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At the trial, before Maule, J., at the second sitting in London, in Easter Term, 1848, in support of this plea the defendant called W. Cook, one of the drawers. He proved that the plaintiffs' traveller called at his warehouse, and looked out the goods, which were sent to the plaintiffs in satisfaction of the bill. He also admitted that the amount of the bill had been paid to him, Cook, by the defendant.

On the part of the plaintiffs, it was insisted that this evidence did

(1) See sect. 59 of the Bills of Exchange Act, 1882.—J. G. P.

not sustain the plea, inasmuch as it did not show that the goods were delivered to or received by the plaintiffs in satisfaction of their claim against the defendant as acceptor.

A verdict having been found for the defendant upon the issue on the fourth plea, and for the plaintiffs on all the other issues,

Byles, Serjt., in Easter Term, 1848, obtained a rule *nisi* to enter the verdict upon the fourth issue, for the plaintiffs, or for judgment *non obstante veredicto*. The learned Serjeant submitted that the fourth plea would admit of two constructions: that it might mean that the goods were delivered and accepted in satisfaction and discharge of all damages and causes of action which the indorsees had against Cook, the party delivering them; or it might mean, in satisfaction and discharge of the bill and of all damages and causes of action thereon against any party to it; that, if the plea was to be read according to the first of these constructions (which, it was suggested, it must be), then it was clearly a bad plea; and that, if it was to be taken in the latter sense, it would raise this question, whether a payment or satisfaction of a bill by the drawer, the acceptor being no party to such satisfaction, discharges the right of action of the holder against the acceptor.

Against this rule cause was shown by *Channell*, Serjt., in Trinity Term last, and *Byles*, Serjt., and *Prentice*, were heard in support of it. The arguments and the authorities cited are so fully commented upon in the judgment, that it has been thought unnecessary to report them.

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WILDE, Ch. J. :

The first question which arises upon this motion, is, whether the verdict upon the issue joined upon the fourth plea, has been properly found for the defendant. It is said that the fourth plea is equivocal in its language. It states, that, after the indorsement of the bill to the plaintiffs, and before the commencement of the action, the drawers had delivered to the plaintiffs, and the plaintiffs had accepted, divers goods, of the value of 50*l.*, in full satisfaction and discharge of the bill, and all damages and causes of action in respect thereof; and that the plaintiffs, from the time of the said satisfaction of the bill, hitherto, had always held the same against the will and consent of the said drawers, and so still held the same; and that the plaintiffs commenced this action, and still prosecuted the same, against, and in opposition to, the will and consent of the

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said drawers. The question is, whether this plea, whether it is a valid and sufficient plea, or not, means to allege that the drawers gave to the plaintiffs, at their request, and that the latter accepted, the goods in the plea mentioned, in satisfaction of the bill, and of all damages and causes of action in respect thereof as against any of the parties thereto; or, in other words, whether it means that the goods were delivered and accepted in extinguishment of all right of action of the plaintiffs upon the bill. It is true that the goods might have been given, not in satisfaction and discharge of the bill generally, but in discharge of the liability of the Cooks, and in respect of the causes of *action by the plaintiffs against them. I do not think that that is the fair meaning of the plea; but I think it means, that the goods were delivered in satisfaction and discharge of all damages and causes of action in respect of the bill, whether against the Cooks, or against any other parties to it. So understanding the plea, was the evidence such as to warrant the finding of the jury? Look at the situation of the drawers. Suppose the drawer of an accommodation bill pays the amount to the holder: what is the reasonable intendment of the payment? If he does not make the payment in satisfaction and discharge of the holder's claim against every party on the bill, what good does he get by changing the plaintiff against him? The drawer of an accommodation bill is, in truth, the only party ultimately liable upon the bill. A person standing in that position, when he pays the bill, must be understood to make the payment in satisfaction of all claims against any one upon the bill. It appears that this bill was drawn for value. The drawers received from the acceptor the full amount of the money. It then became their duty to adjust and extinguish all remedies of the holders against any party to the bill. Having a general account with the plaintiffs, the items on the debit side of which, including the bill in question, amounted to 81*l.*, and those on the credit side to 31*l.*, the drawers deliver to the plaintiffs goods to the amount of 50*l.* Suppose, instead of goods, they had given the plaintiffs 50*l.* in money, the necessary intendment would undoubtedly be that it was a payment in satisfaction and discharge. The goods having been delivered as money, and so treated by all parties, I see no difference between a payment in money and a payment in goods. The fair meaning of the plea, I think, is, that the goods were delivered in satisfaction and discharge of the liability of every party to the bill: and the evidence warranted the jury in finding for the defendant.

Whether or not enough is disclosed on the face of the plea, to make it enure as a defence, is a matter of more difficulty ; and upon that, and the authorities cited, we will take time for deliberation.

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I also am of opinion that this plea is large enough to import a payment (in goods) in satisfaction and discharge of the liability of all the parties to the bill. Assuming that it can so enure, it ought to be so construed as to make it a good defence,—the plaintiffs having pleaded over. In that view, it seems to me that the plea is sufficient. Being so understood, was there evidence to warrant the finding for the defendant? It was clearly the duty of the holders, under the circumstances, to discharge the liability of the defendant. I think there was abundant evidence to warrant the jury in finding that the goods were delivered to and accepted by the plaintiffs in satisfaction and discharge of the liability of every party to the bill.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the COURT :

The declaration in this case charges the defendant as the acceptor of a bill of exchange for 49*l.*, drawn by W. and C. Cook, payable to their order, at three months after date, and indorsed by the drawers to the plaintiffs ; and, among other pleas, not material to be noticed on the present occasion, the defendant, by his fourth plea, alleged, that, after the indorsement of the bill of exchange to the plaintiffs, and before the commencement of the action, the drawers of the bill had delivered to the plaintiffs, and the plaintiffs had accepted, divers goods, of the value of 50*l.*, in full satisfaction and discharge of the said bill of exchange, and all damages *and causes of action in respect thereof ; and that the plaintiffs, from the time of the said satisfaction of the said bill of exchange, to the time of the pleading of the plea, had always held the same against the will and consent of the said drawers, and so still held the same ; and that the plaintiffs commenced this action, and still prosecuted the same, against, and in opposition to, the will and consent of the said drawers.

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To this plea, the plaintiffs replied *de injuriâ* ; and a verdict was found for the defendant, upon the trial of the issue joined on that plea.

A rule has since been obtained by the plaintiffs, calling upon the defendant to show cause why judgment should not be entered for

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them *non obstante veredicto*, in respect of the insufficiency of that plea.

Upon this record, the bill of exchange must be taken to have been accepted upon a good consideration. The interest of the acceptor, therefore, is not liable to be affected by the state of accounts, or equities, between any other parties connected with the bill: and the only question in which he has any interest, is, whether the party seeking to enforce payment by him, is the legal owner of the bill, and whether recovery by, and payment to, such party, will enure as a satisfaction and absolute discharge of his liability upon the bill. By the indorsement averred in this declaration, and not traversed, the plaintiffs became the legal owners of the bill; and the recovery of the amount thereof will have the effect of discharging the defendant from all future liability. The plea does not allege whether such satisfaction was given and accepted before or after the bill became due; nor is it averred to have been at the request, or for or on behalf, of the defendant, or in satisfaction of his liability upon the bill, or of the cause of action of the plaintiffs against him: nor does it, in any way, connect the defendant with the transaction, or *show any privity between him and the parties to the satisfaction given, except so far as such parties were the drawers of the bill, and the defendant was the acceptor.

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As the plea did not allege that the satisfaction was made at the request, or for or on behalf, of the defendant, or in respect of the cause of action stated in the declaration, the defendant was not required to give any evidence to such effect, to entitle him to the verdict he obtained: and therefore the verdict will not warrant an intendment of any such facts, or of any other fact tending to extend the import of the plea as stated upon the record: and the question raised by the plea, according to its terms, is, whether satisfaction of a bill as between a drawer or indorser, and an indorsee, made before or after the bill becomes due, enures as a satisfaction on behalf of the acceptor, and operates to discharge him from liability to the indorsee.

In support of the rule, it was contended, that the plea did not show sufficient matter to bar the plaintiffs from judgment, because the satisfaction therein set forth, was not, as before stated, averred to have been made at the request, or for or on behalf, of the defendant, or for or in respect of the cause of action declared upon; and that no legal privity was shown between the parties who made

satisfaction, and the defendant, and therefore the satisfaction made, did not enure as a discharge of the defendant; and that the satisfaction was made by parties who were under a personal liability upon the bill declared on, either absolute or contingent; and that the plea imports that the satisfaction made by them, referred, and was limited, to their own personal liability, and was not shown to have extended beyond; and that the satisfaction to the indorsee of a *bill, made by the drawer or indorser, did not, as a legal consequence, enure as a satisfaction of the bill *quoad* the acceptor, or any other person, other than those who, if called upon by the indorsee to pay the bill, would have a remedy over against the party who made the satisfaction, and thereby subjecting such party to a liability to make double satisfaction.

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It was also insisted that the plea did not show any legal privity between the drawers who made the satisfaction, and the defendant; and that the plea, therefore, at most, amounted to a plea of satisfaction made by a stranger, and, as such, could not be pleaded in bar against the plaintiffs.

On the part of the defendant, it was contended, upon showing cause, that, upon principle and authority, satisfaction made by the drawer of a bill, to an indorsee, enured by law as a satisfaction by or on behalf of the acceptor, and might therefore be pleaded in bar to any action afterwards brought by the indorsee against the acceptor; and that the drawer and acceptor's being parties to the same bill, was a sufficient legal privity to make satisfaction by the drawer enure as a discharge of the acceptor, as against the indorsee who received the satisfaction: and, further, it was contended that it was competent to any one to plead in bar satisfaction, even by a stranger, for the cause of action sued upon, which had been accepted by the plaintiffs.

The case was very elaborately argued, and many authorities were referred to on both sides. The Court has examined all the authorities referred to, and considered the case, and, in the result, is of opinion that the plea, as proved and sustained by the verdict, does not show sufficient matter to bar the plaintiffs, and that the rule to enter judgment for the plaintiffs *non obstante veredicto*, must be made absolute.

In considering the case upon principle, it will be *proper to advert to the legal relation in which the respective parties stand towards each other, upon the effect of whose acts and rights the determination of the rule must depend. It is to be observed that

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the drawers and acceptor are parties to the same instrument, as contractors with each other, and not as joint-contractors with a third person; and that, by the indorsement of the bill, independent and different contracts arise, on the respective parts of the drawers and the acceptor, with the indorsees. The acceptor is primarily and absolutely liable to pay the bill, according to its tenor. The drawers are liable only upon the contingencies of the acceptor's or drawee's making default, and of the holder's performing certain conditions precedent, such as, presenting the bill according to its tenor, and giving due notice of the failure of the acceptor, or drawee, to pay, upon a proper presentment.

The contracts created by the bill, as regards the drawers and the acceptor, are therefore essentially distinct; and there seems to be no legal ground why the indorsee of a bill may not accept satisfaction of the contingent or absolute liability of the drawer, without, by so doing, discharging the acceptor.

The competency of an acceptor to pay, may be doubtful; and no valid reason is apparent why the indorsee may not release and discharge the drawer, or an indorser, by competent legal means, either upon consideration more or less valuable, or without, and retain his remedies against the acceptor, unless in the case of an accommodation bill, in which case, the acceptor is a mere surety, as between him and the drawer, and entitled to recover against the drawer whatever he may be compelled to pay in discharge of his suretyship. In such a case, where an indorsee who has received satisfaction from the drawer, with notice, sues the acceptor, a different question may arise: but, upon the record in *this case, the bill must be taken to have been a bill accepted for value, and which the acceptor therefore ought, in all events, to pay; and, having received value, it is difficult to discover any valid reason why he should be discharged from his liability to make the payment, which, for value, he has contracted to make, by reason of any arrangements between others, to which he is no party, in which he is not shown to have interfered, or his rights and liabilities are not shown to have been in the contemplation of the parties to any such arrangements, and by which his interests are not in any respect compromised or affected.

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By the indorsement of a bill, the indorsee becomes the legal owner of it; and satisfaction of the contingent or absolute liability of the drawer, or of an indorser, does not necessarily vacate or avoid the effect of the indorsement, or destroy the title of the

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indorsee to the ownership of the bill. Payment of the bill by a drawer, or an indorser, may or may not, according to circumstances, entitle the party paying, to the possession of the bill: there may be a satisfaction of the bill between such parties, which may not entitle them to the possession of the bill. The plea in question has no statement to the effect that the drawers, by reason of the satisfaction made, were entitled to have the bill delivered up: it only states that the plaintiffs hold the bill against the will and consent of the drawers,—which is by no means equivalent to a statement that they were entitled to have the bill delivered to them. The plea does not aver that the value of the goods delivered in satisfaction, was equal to the amount of the bill; and it is consistent with the language of the plea, that the drawers may have made satisfaction of the bill, so far as regarded their liability, by any small composition, leaving the plaintiffs with all their remedies in point of law against the acceptor and other *parties to the bill; and yet the drawers may afterwards have dissented from the plaintiffs' retaining the bill, or suing the acceptor upon it.

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The terms of the plea do not import that the satisfaction was made upon any contract or condition, either that the bill should be delivered up, or be deemed to be satisfied as between the plaintiffs and the acceptor: and, when the nature of the relation in which the respective parties stand towards each other, is considered, no principle is apparent upon which, as a consequence in law, the satisfaction of a bill as between the indorsee and the drawer, should operate as a satisfaction and discharge in favour of the acceptor.

Supposing the effect of the plea to be, that the plaintiffs are suing as trustees for the drawers, but against their consent, such matters would furnish no legal bar to the plaintiffs, as the law can take no notice of the trust, nor, consequently, whether the trustee is enforcing his legal rights against a third person with or against the consent of his cestui que trust. And we are of opinion that the defendant has not established any legal principle which will entitle him to judgment upon this plea.

But it has, on his behalf, been contended, that the plea ought to be supported, and judgment given for the defendant, upon authority.

We have reviewed the authorities relied upon, and they do not appear to us to entitle the defendant to judgment.

The case of *Bacon v. Searles* (1) was cited; and it must be

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admitted, that, in that case, according to the report, it was held that the indorsee of a bill, who had received from the drawer a part of the amount of the bill, was entitled to recover from the acceptor only the *balance; and Lord LOUGHBOROUGH, then Chief Justice, is reported to have said, "that, if the drawer of a bill anticipates the acceptor, and pays the money himself, he thereby releases the acceptor from his undertaking:" and he adds: "so that, if the acceptor were to pay the bill after notice given to him that the drawer had already paid it, an action would lie for the drawer against the acceptor, to recover back the money so paid." Lord LOUGHBOROUGH concludes his judgment by saying, "Another reason which weighs much with me, is, the great mischief which would ensue to merchants, among whom accommodation bills are circulated to a vast extent, if, after a bill had been taken up by the drawer, the acceptor should be called upon for payment." The report of this case is not satisfactory. Lord LOUGHBOROUGH is made to say, that, if the drawer anticipates the acceptor, and pays the money himself, he thereby releases the acceptor from his undertaking: and yet he is said to have added, "that, if the acceptor were to pay the bill; after notice given to him that the drawer had already paid it, an action would lie for the drawer to recover it back again;" which, as applied to the facts of the case, is not very intelligible. If it was meant, that, supposing the drawer should sue the acceptor upon the bill, the acceptor could not plead in bar the payment to an indorsee, after notice that the drawer had paid it, it is intelligible, but not, upon the facts stated, very satisfactory. The point in judgment, was, whether an indorsee, after having received payment of part of the bill from the drawer, was entitled, in an action against the acceptor, to recover the whole amount of the bill, or only the balance of the bill remaining unpaid; and it was held that the balance only was recoverable. As a decision upon that point, it has been over-ruled. The observations made by the Judges, render it uncertain whether it was the case of a bill for *value, or an accommodation bill: but those observations are of doubtful accuracy, in either view of the case. If it was a bill for value, the remark is not correct, that payment by the drawer discharged the acceptor from his promise; because the acceptor in such a case would be clearly liable to the drawer, who, by his payment to the indorsee, would become entitled to sue the acceptor upon the bill: and, if it was the case of an accommodation bill, the remark is unintelligible, that, if the acceptor, who would

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be surety only for the drawer, was to pay the bill after notice, the drawer, who was the principal debtor, might recover the money back again from the acceptor, his surety.

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It may be that what was intended to be said, was, that such a payment by the acceptor would make the indorsee a trustee for the drawer, and liable to refund to him what should be paid by the acceptor: but it is by no means clear that this was intended to be said, because the remarks refer to the acceptor's liability to refund, in terms, and speak of a payment by the acceptor, after notice of payment by the drawer,—which would be quite immaterial, upon the question whether the indorsee would become a trustee for the drawer, in regard to the sum received from the acceptor. The doubt whether it was the case of a bill for value, or an accommodation bill, is increased by the observations of Mr. Justice WILSON, who referred to a case of *Beck v. Robley* (1).

Considering this case of *Bacon v. Searles* with reference *to the point decided, that part of a bill (accepted for value) being paid by a drawer or indorser, disentitles the indorsee to recover from the acceptor more than the balance remaining unpaid, it has been over-ruled by modern decisions, and is not now to be deemed to be law: and, if it is to be considered as the case of an accommodation bill, it is inapplicable to the questions which arise upon this plea.

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Mr. Justice WILSON referred to the case of *Beck v. Robley*, reported in a note to *Bacon v. Searles*, and which, it would seem from the statements in the report, was the case of an accommodation bill. The facts were these: Brown drew the bill upon Robley, payable to Hodson, and gave the bill to Hodson as security for an advance made to him by Hodson. Robley accepted the bill, and Brown, the drawer, took it up when due, in Hodson's hands, and received back the bill with Hodson's indorsement upon it. Brown, after the bill had become due, paid it to Beck, who brought the action against Robley. The action was held not to be maintainable; and correctly so; as, after the bill had become due, the drawer could only negotiate it subject to such equities as existed against him; and, it being an accommodation bill, Brown, the drawer,

(1) Note to *Bacon v. Searles*, 1 H. Bl. 89, n.; Bayley on Bills, 125. In *Beck v. Robley*, A. drew a bill on the defendant, payable to B. or order. The bill not being paid at maturity, B. returned it to A. who took it up, B.'s indorsement remaining thereon,

A. gave the bill as a security to the plaintiff, informing him of the circumstances. It was held that the bill was extinguished by being taken up by the drawer, and could not be again negotiated.

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could not have sued the acceptor, and so neither could a subsequent holder claiming under him after the bill had become due. The decision against the plaintiff, therefore, would have been correct, irrespectively of another fact relied upon in that case, viz. that Beck, the plaintiff, was compelled to claim through the indorsement of Hodson, the payee: and the Court was confirmed in its decision against the plaintiff, upon the ground, that, if effect were given to Hodson's indorsement under the circumstances, Hodson himself might be rendered liable,—a result which ought not to occur. It is unnecessary to consider the correctness of that opinion: but both the cases of *Bacon v. Searles* *and *Beck v. Robley* would be well decided, if the bills upon which those actions were brought were accommodation bills; and *Beck v. Robley*, in that event, might be considered as an authority for the determination of *Bacon v. Searles*.

Upon *Bacon v. Searles* being cited as an authority, in *Purssord v. Peek* (1), as deciding that a payment by the drawer of a bill discharged the acceptor *pro tanto*, Lord ABINGER, C. B., said, that, “if that were the principle of that case, it might be a question whether, if it were now considered, it would not be over-ruled.”

The case of *Johnson v. Kennion* (2) was cited as an authority, on the part of the plaintiffs, that the contract created by the bill, could not be severed and made the ground of two actions, and that the holder must bring an action for the whole, and be considered trustee for the drawer, for so much as he had paid. Mr. Justice WILSON is said to have referred to the case of *Beck v. Robley*, as contrary to that position: but it is not obvious that such is the effect of *Beck v. Robley*. *Johnson v. Kennion*, however, distinctly decided that the indorsee was entitled to recover the whole amount of the bill, although he had received a part from the drawer: and, unless *Bacon v. Searles* and *Beck v. Robley* were distinguishable, upon the ground of the actions being upon accommodation bills, it does not appear how the authority of *Johnson v. Kennion* was avoided.

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Assuming, however, *Bacon v. Searles* and *Beck v. Robley* to be authorities that the acceptor of a bill for value, is discharged altogether, or *pro tanto*, by payments made by a drawer or indorser, to an indorsee, who afterwards sues the acceptor, they cannot be considered as binding authorities; and they are inconsistent *with *Callow v. Lawrence* (3), where the continued liability of the acceptor

(1) 9 M. & W. 196,
(2) 2 Wils. 262,

(3) 15 R. R. 423 (3 M. & S. 95),

is distinctly determined; and *Hubbard v. Jackson* (1) is a decision to the same effect, following the authority of *Callow v. Lawrence*: and, in both cases, *Beck v. Robley* was treated as a decision upon the ground that the plaintiff could not claim through Hodson's indorsement.

Pierson v. Dunlop (2) was an action against the acceptor of a bill for 300*l*. The drawer having paid 180*l*., the plaintiffs took a verdict for the whole amount, which the Court compelled them to reduce, at their own cost. There can be little doubt that this also was the case of an accommodation bill; as it appears, that, after the verdict, a bill in equity was filed to obtain a discovery of the payment, and reduction of the verdict; and, if the cestui que trust of the plaintiffs was not entitled to receive the 180*l*., the Court, in its equitable jurisdiction, could not have permitted their trustee to recover it. The case would resolve itself into that of a payment by the principal debtor, in ease of the surety.

In the case of *Walryn v. St. Quintin* (3), the plaintiffs were required to give the acceptor credit for the amount of the payment made by the drawer, the Court holding the bill to be an accommodation bill.

The several other cases which were cited on the part of the defendant, are no authorities for the purpose for which they were cited: indeed, they are rather against him.

In *Pursord v. Peck* (4), the Court held that the plea was bad for duplicity: it alleged that the defendant, the acceptor of a bill of exchange, had accepted it *for the accommodation of the drawer, and that the drawer had satisfied the bill; and it further stated, that, at the time of the action, the plaintiff was a holder of the bill without consideration or value.

Reynolds v. Blackburn (5) was an action by indorsee against the acceptor of an accommodation bill; and the plea alleged, by way of discharge, notice to the plaintiff, and that, after such notice, he received other bills from the drawer, and agreed to give time upon the bill sued upon, until such other bills should become due, and be dishonoured: the plea proceeded to state that the bills were so delivered and accepted in payment of the bills in the declaration, and that the agreement was made without the defendant's knowledge, privity, or assent. The plaintiff replied *de injuriâ*; to which

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(1) 29 R. R. 582 (1 Moo. & P. 11;
S. C. 4 Bing. 390; 3 Car. & P. 134).
(2) 2 Cowp. 571.

(3) 1 Bos. & P. 652.

(4) 9 M. & W. 196.

(5) 7 Ad. & El. 161; 2 Nev. & P. 137.

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the defendant demurred, for duplicity. The COURT said the replication was as good as the plea, which had set up two defences, and gave judgment for the plaintiff.

Sard v. Rhodes (1) was also an action against the acceptor of an accommodation bill, in which the defendant pleaded, that the bill was an accommodation bill, and that the drawer had given another note, for a larger sum, in payment and satisfaction, which the plaintiff had accepted. The plaintiff replied, that the note so given was dishonoured. The defendant demurred, and the replication was held ill, and the plea good.

In each of the three last-mentioned cases, the pleas alleged the bills to be accommodation bills,—showing what is now understood to be the law in regard to payments or arrangements between subsequent parties to the bill; which can have little application to the present case, which is that of a bill accepted for value.

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Field v. Carr (2) is also inapplicable: it was an action by bankers, as indorsees, against the acceptor; the drawer having delivered the bills to the plaintiffs, his bankers, as security, and the acceptor having paid the amount of the bills to the drawer without obtaining the bills, which remained in the hands of the bankers: and the point really in contest, was, whether, upon the application of the rule in *Clayton's* case (3), the bills, as against the bankers, the plaintiffs, were to be considered as satisfied: the COURT held that they ought to be so considered.

The case of *Thomas v. Fenton* (4) was argued before Mr. Justice Coleridge. It was an action against the drawer of an accommodation bill; and it appeared, that, the bill being dishonoured, an action had been brought by one Clark, against the acceptor, and that the plaintiff, as a volunteer, being the son-in-law of the acceptor, had paid the debt and costs, and obtained the bill from the then plaintiff, with the defendant's indorsement upon it, and brought the present action upon the bill. One question was, whether the bill ought to be deemed an accommodation bill. A further question was, whether there was a sufficient dispensation of giving notice of the dishonour; also, whether the payment which had been made, supported the plea of payment by the acceptor. An objection was also made, that the bill required a new stamp. Mr. Justice COLERIDGE held that the bill did not require a new

(1) 1 M. & W. 153; Tyr. & Gr.
298; 4 Dowl. P. C. 743; 1 Gale, 376.

(2) 5 Bing. 13; 2 Moo. & P. 46,

(3) 15 B. R. 161 (1 Mer. 572, 604).

(4) 79 B. R. 831 (5 Dowl. & L. 28).

stamp, inasmuch as it had never been paid, payment meaning payment by the party ultimately liable, and the payment in question not being such a payment. He also held, that sufficient excuse was alleged for not giving notice, the bill being an accommodation bill. And the learned Judge distinctly intimates that payment by an intermediate party is no discharge to the acceptor.

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Hemming v. Brook (1) was an action against the acceptor, where the drawer had paid part of the bill. The cause was undefended: the counsel for the plaintiff was instructed as to the payment, but altogether uninformed whether the bill was an accommodation bill, and of every other circumstance respecting it. The Judge, therefore, recommended that a verdict should be taken, giving credit for the payment.

Pournal v. Ferrand (2) determined that the indorser of a bill, paying a part of the bill to the holder, might recover from the acceptor the amount so paid, as money paid to his use. It is to be observed, that the plaintiff in that case had paid 40*l.* on account of a bill indorsed by him, and which had been accepted by the defendant, for 350*l.* After the payment of 40*l.* by the plaintiff, the holder of the bill brought an action upon the bill against the defendant, the acceptor, and recovered a verdict for the whole amount of the bill, 350*l.*, but afterwards levied the balance only due to him, giving credit for the 40*l.* which the plaintiff had paid: and, in consequence of the defendant's having thus derived the benefit of the plaintiff's payment, the action was brought by the plaintiff, to recover the amount as money paid to the defendant's use; when it was contended that the plaintiff could only sue upon the bill: but the Court held, that there might be a difficulty in suing upon the bill, by reason of a judgment having been recovered against him for the whole amount of the bill, by a former holder; and that, the defendant having had the benefit of the payment, an action for money paid might be maintained.

Lane v. Ridley (3) was to the same effect as *Reynold v. Blackburn*, *Purssord v. Peek*, and *Pascoe v. Vyryan* (4), viz. that, where the plea is double, it is no objection that the replication is also double.

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Reference has thus been made to the several cases which were cited, with some regret, as the only result is, to show that they are inapplicable to this case, and afford no assistance to the Court in

(1) Car. & M. 57.

(3) 10 Q. B. 479.

(2) 30 R. R. 394 (6 B. & C. 439; 9

(4) 1 Dowl. N. S. 939.

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determining the question raised upon the record ; and, in fact, no determination has been brought to the notice of the Court, showing this plea to be good, although there are some expressions in some of the older cases which have that aspect, but which *dicta* were not necessary to the decision of the cases in which they are to be found ; and such *dicta* are not consistent with subsequent determinations. It certainly has been no rare practice for indorsees of bills of exchange and promissory notes, to take verdicts for the full amount of the instruments, after having received partial payments from other parties to such instruments : and there are reported authorities in distinct affirmation of the right so exercised by the plaintiffs, *Callow v. Lawrence*, before mentioned, *Reid v. Furnival* (1), and numerous cases in bankruptcy, where proof is admitted against the acceptors of bills and makers of notes, for the full amount, notwithstanding partial payments made by other parties. In *Ex parte De Tustet, In re Corson* (2), Warren and Bruce were held entitled to prove against the estate of the bankrupts, who were the acceptors, for 1,364*l.*, and take dividends for that amount, notwithstanding they had received payments from other parties, reducing their demand to 420*l.*

We think, therefore, that this plea is contrary to principle, and that it has no authority to support it.

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The plaintiffs stand upon the record the legal owners of the bill, and the defendant as having failed to perform his contract, without any legal excuse for the breach. The defendant was the party primarily liable, and, by his plea, he sets up, by way of discharge, satisfaction by one not in privity with him in relation to such satisfaction, and which we think did not enure to his discharge ; and we think the plea, therefore, bad, and the plaintiffs entitled to judgment, as prayed.

Upon the argument of this case, we were much pressed with the objection to the plea upon the ground that it was, in effect, a plea of satisfaction by a stranger ; which, it was said, was bad in law. The opinion of the Court upon the other objections to the plea, being in favour of the plaintiffs, it has become unnecessary to decide upon the validity of this particular objection. But, as the Court has been called upon to consider the law in relation to this subject, it may be a convenience to the profession to mention the authorities which are to be found upon the subject.

It may appear that the law is not perfectly settled. The

(1) 38 R. R. 684 (1 Cr. & M. 538).

(2) 1 *Ross*, 10.

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authorities of the text-books are generally to be found under the title of "Accord and Satisfaction;" and most, if not all, of such text-books, refer to accord and satisfaction by and between the parties to the cause of action, and but very few authorities are to be found upon the subject of satisfaction made by a stranger. Notwithstanding the passages referred to in the text-books, there is very early authority to the effect that satisfaction made by a stranger to a party having a cause of action, and adopted by the party liable to the action, may be used as a good bar to an action for such cause. It is stated in Fitzherbert's Abridgment (1), that, "If a stranger does trespass to me, and one of his relations, *or any other, gives anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for, if I be satisfied, it is not reason that I be again satisfied. *Quod tota curia concessit.*" A very diligent search has not found any old authority inconsistent with the case in Fitzherbert. In several cases obligations given by strangers to parties having a cause of action, have been held to be no bar to an action between the parties to such a cause: but it will be found that all those cases were decided upon the ground that the obligation, so given, was collateral, and not by way of satisfaction, or in extinguishment or merger. In connexion with this branch of the law, this consideration will always be found material.

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In Fitzherbert's Abridgment, title Dette, pl. 83, it is said: "In debt on contract, it is no plea to say that the plaintiff has a bond of a stranger, for the same duty; but, to say, that he has a bond of the defendant himself for the same duty, is a good plea" (2). So, in F. N. B. 121 M., it is said, "If a man contract to pay money for a thing which he hath bought, if he make a bond for the money, the contract is discharged, and an action of debt will not lie upon the contract." "But (3) it is otherwise if a stranger makes an obligation for the same debt." 5 Viner's Abridgment, 515, is to

(1) Title Barre, pl. 166 (Hilary, 36 Hen. VI.). And see Co. Litt. 206 b.

(2) Per SHARD. (SHARDELOW, J.), 29 Hen. VIII., Bro. Contract, pl. 29), "If a man be indebted to me by contract, and afterwards makes to me a bond of the same debt, the debt is thereby determined; for, in debt upon the contract, it is a good plea, that he has a bond of the same debt. But, if a stranger makes to me a bond for the

same debt, still the contract remains; because it is by another person; and both are now debtors."

(3) Lord Hale's note, *ib.*, citing Fitz. Abr., H. 35 Edw. III., Dette, pl. 83; and referring to 11 Hen. IV. fo. 79 (*Runfe Baker's* case, T. 11 Hen. IV. fo. 79, pl. 21); 13 Hen. IV. fo. 1 (M. 13 Hen. IV. fo. 1, pl. 3); 10 Hen. VII. fo. 21 (P. 10 Hen. VII. fo. 21, pl. 16).

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the same effect; also Brooke's Abridgment, title Contract, pl. 29. In **Pudsey's* case, cited in *Hooper's* case (1), it was held, that a bond given by a stranger, pursuant to a stipulation in the original contract, will be a bar; but, otherwise, upon a subsequent contract." The same point was decided in the principal case of *Hooper*.

Some doubt has arisen upon the point of satisfaction by a stranger, from the case of *Grymes v. Blofield* (2). The report in Cro. Eliz. states it to have been an action on an obligation for 20*l*. The defendant pleaded that J. S. had surrendered a copyhold tenement, in satisfaction, which the plaintiff accepted. The plaintiff demurred to the plea; and it is said that POPHAM and GAWDY, JJ., held it to be no plea, for J. S. was a mere stranger, and not privy to the condition, and therefore satisfaction by him was not good; and that afterwards, in Easter Term, 31 Eliz., POPHAM and CLENCH adjudged for the plaintiff, in the absence of the rest of the justices. In Comyns's Digest, the case is stated to the same effect. But, from the report of the same case in Rolle's Abridgment, it is to be inferred that judgment was given for the defendant.

In the case of *Edgcombe v. Rodd* (3), which was an action for trespass and false imprisonment, to which satisfaction by another party was pleaded (upon the authority of *Grymes v. Blofield*), accrediting the report in Cro. Eliz., because cited in Comyns without disapprobation, the Court seems to have thought the plea bad, as setting up satisfaction by a stranger. In *Edgcombe v. Rodd*, however, the plea was held to be bad upon another substantial ground, upon which the judgment rather seems to have been founded.

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The rolls of the Court have been searched, to ascertain the real state of the case of *Grymes v. Blofield*: but without much satisfaction being obtained. There are three rolls, importing three distinct actions upon three obligations for 20*l*.; and, in each case, a plea of satisfaction by J. S. by the surrender of a copyhold. The rolls are of Trinity Term, 36 Eliz., B. R. No. 844, No. 845, No. 846. On the roll 844, the plea was demurred to, and a joinder in demurrer, with a *dies datus* to Michaelmas Term; and there is no further entry upon that roll. Upon the roll 845, the pleadings are to the same effect, with a form of a *dies datus* in blank, and no

(1) 2 Leon. 110.

(2) Reported in Cro. Eliz. 541, and in Rolle's Abridgment, 471 (translated, 5 Vin. Abr. 296, Condition (F. d.),

pl. 1, and in Comyns's Digest, Accord (A. 2), 5). And see M. 28 Hen. VI. fo. 4, pl. 21.

(3) 7 B. R. 700 (5 East, 294).

further entry upon that roll. Upon the roll 846, there is a declaration and plea to the same effect as in the other rolls, with a replication traversing the surrender of the copyhold in satisfaction, and the acceptance. Issue was joined, and the cause tried, and a verdict found for the plaintiff, which was entered upon the *postea*. There is then an entry that a new trial was granted, upon the ground that the *venire* had issued to a wrong county: and a new *venire* awarded; and there the entry upon that roll ceases.

Upon further inquiry being made, there has been found a report of the case in the MSS. reports in the British Museum, in the Hargrave MSS. No. 7, Vol. 2, p. 251, reports by Humphry Were. The case is reported in substance, as in Cro. Eliz., referring to the roll in B. R. (Trinity Term, 36 Eliz.) 844; and it states that FENNER, J., doubted of the opinion of POPHAM and GAWDY, by reason of the acceptance of the plaintiff, and cites the 36 Hen. VI. title Barre (1), which is the case referred to in Fitzherbert's Abridgment (2): and it afterwards *states, that, upon the case being moved again, CLENCH and FENNER agreed that the plea was a good bar; and that GAWDY said the case of *Trespas*, 36 Hen. VI. (3), was good law: and the report then states, that, in Easter Term, 39 Eliz., the plaintiff had judgment to recover, POPHAM and CLENCH only being in Court.

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There is another report of the same case in the Hargrave MSS., No. 50, in a book said to have been given, in 1618, by Arthur Turnour to Serjeant Calthorpe, in exchange for other books: but that report does not state any judgment to have been given.

In the Lansdowne MSS. in the British Museum, No. 1104, fo. 152 b, being a report of cases from the 6th to the 41st year of Elizabeth, the same case is reported, stating a judgment for the plaintiff; and the report being precisely to the same effect as in the Hargrave MSS.

It appears that Humphry Were was, at a somewhat later period, a reader to the Inner Temple, and afterwards a Serjeant.

It seems probable that the report in Croke, stating the judgment to have been given for the plaintiff, is correct; although no answer is suggested to the authority of the 36 Hen. VI., which seems contrary to the decision, and to have been referred to.

In *Thurman v. Wild* (4), the question as to the effect of satisfaction

(1) 36 Hen. VI. Fitz. Abr. Barre, pl. 166.

(2) The reference by FENNER, J. is in the form at that time and long since used in citing Fitz. Abr.

(3) Not a case in title "Trespas," but the above case of an action of trespass reported in Fitz. Abr. tit. Barre, pl. 166.

(4) 11 Ad. & El. 453; 3 P. & D. 289.

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by a stranger, also arose; and the COURT seemed to recognise the decision of *Grymes v. Blofield* as correct; but held that the satisfaction pleaded in that case was a good bar, because made by one who was not a stranger, but a joint trespasser; and it therefore became unnecessary to decide how far satisfaction by a stranger would have been a good bar.

[198] Such seems to be the state of authority upon that question: and the Court does not feel called upon to express any opinion upon the point, although it must be obvious that the decision in the 36 Hen. VI., reported in Fitzherbert, is consistent with reason and justice (1).

The Court, in this case, is of opinion that the plea is bad upon other grounds; and it is therefore unnecessary further to investigate the general point referred to.

Judgment for the plaintiffs.

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Feb. 15.

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(9 C. B. 324—338; S. C. 19 L. J. C. P. 256; 14 Jur. 902.)

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When a court of competent jurisdiction has given judgment for the defendant, and that judgment remains unreversed, it must be taken to have been rightly given, and the plaintiff cannot have a second action for the same cause.

THIS was an action of assumpsit, commenced by writ of summons, dated the 9th of January, 1849.

(1) Lord Bacon, in the preface to his *Rules and Maxims*, says that he might have made an ostentation of learning, by vouching authorities, but that he abstained from it, "having the example of Mr. Littleton and Mr. Fitzherbert, whose writings are the *Institutions of the Laws of England*, whereof the one forbeareth to vouch authority altogether, and the other never reciteth a book but when he thinketh the case so weak of credit in itself, as it needs a surety."

What Bacon here says relates to Fitzherbert's *Natura Brevium*. Fitzherbert's Abridgment rests wholly on authorities either taken from the Year Books, or from original cases now nowhere else extant. To the latter class belongs the case in 36 Hen. VI., above referred to. Another case of

the same class in Fitz. Abr. M. 33 Edw. I. tit. Annuities, pl. 51, is to this effect: "Annuity against heir, upon a deed of grant made by his father until the defendant (the plaintiff) should be advanced to a suitable (covenable) benefice. Tilton: After the death of our father, our mother gave to the plaintiff, at our procurement, and in our discharge, the deanery of T. of which the plaintiff is now seised. Herle: The writing is, 'until he be advanced by the grantor or his heirs.' Hengham: *Qui per alium facit, per seipsum facere videtur*, and awards that he answer over. Herle: The mother of the defendant gave us the deanery for our service, and not in discharge of the annuity: and this he is ready to verify. *Et alii e contra.*"

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The first count of the declaration stated, that, theretofore, to wit, on the 19th of June, 1847, one Robert Remmett made his bill of exchange in writing, bearing date, to wit, the day and year aforesaid, and then directed the same to the defendant, and thereby required the defendant to pay to the order of the said Robert Remmett the sum of 575*l.* 1*s.*, for value received, three *months after the date thereof, which period had elapsed before the commencement of the suit; and the defendant then accepted the said bill of exchange; and the said Robert Remmett then indorsed the said bill of exchange to one Owen Parry; and the said Owen Parry then indorsed the said bill of exchange to the plaintiffs; and the defendant then, in consideration of the premises, promised the plaintiffs to pay them the amount of the said bill of exchange, according to the tenor and effect thereof, and of the said acceptance and indorsements thereof.

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There was also a count upon an account stated.

Plea, to the first count, that the plaintiffs ought not to be admitted or received to declare against the defendant, or to implead him, in respect of the several causes of action in the declaration mentioned, because the defendant said that the plaintiffs, theretofore, and before the commencement of the suit, and after the said bill of exchange in the first count mentioned became due and payable, and after the making of the promises in the declaration mentioned, to wit, on the 2nd of October, 1847, in the Court of our lady the Queen, before her justices at Westminster, impleaded the defendant in an action on promises, and afterwards, to wit, on the 25th of October, in the year aforesaid, declared against the defendant in the said action, for that the said Robert Remmett, on the said 19th of June, 1847, made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the order of the said Robert Remmett, three months after the date thereof, (which period the plaintiffs therein averred had elapsed before the commencement of the said action), the sum of 575*l.* 1*s.*, for value received, and that the defendant then accepted the said bill, and that the said Robert Remmett then indorsed the same to the said Owen Parry, who then indorsed the same to the *plaintiffs, and that the defendant then, in consideration of the said premises, promised the plaintiffs to pay them the amount of the said bill according to the tenor and effect thereof, and of the said acceptance and indorsement thereof; and also that the defendant, on the 1st of October, 1847, was indebted to the plaintiffs in

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1,000*l.* for money found to be due from the defendant to the plaintiffs on an account then stated between the plaintiffs and the defendant; and that the defendant afterwards, to wit, on the day and year last aforesaid, in consideration of the last-mentioned premises, promised the plaintiffs to pay them the said last-mentioned sum of money; yet that the defendant had disregarded his promises, and had not paid the amount of the said bill of exchange, or any part thereof, or any of the said several sums of money in the declaration mentioned, or any part thereof; to the damage of the plaintiffs of 1,000*l.*: That, the plaintiffs having so declared in the said action as aforesaid, the defendant afterwards, in due course, and according to the practice of the said Court, to wit, on the 8th of November, 1847, by H. F. Holt, his attorney, pleaded to the said action, in manner following, that is to say, to the last count of the said declaration in the said action, the defendant then pleaded that he did not promise in manner and form as therein alleged, &c., and to the said first count of the said declaration in the said action, the defendant then pleaded, that, after he accepted the said bill of exchange in that count mentioned, and after the indorsement thereof by the said Robert Remmett to the said Owen Parry, and after the indorsement thereof by the said Owen Parry to the plaintiffs, and whilst the said plaintiffs were the holders thereof, and before the same became due and payable, to wit, on the 19th of June, 1847, it was agreed by and between the plaintiffs and the defendant, that, in consideration that the defendant would, in the

[*327] *event of the said bill of exchange being dishonoured by the defendant when the same should become due and payable, then give and duly execute to the plaintiffs his warrant of attorney for the amount of the said bill, that is to say, for the sum of 575*l.* 1*s.*, and also for all charges and expenses relating to the said warrant of attorney, to be paid on the 25th of December, 1848, with interest, at the rate of 5*l.* per cent. per annum, payable half-yearly, to be computed from the day when the said bill should become due and payable, and would also allow judgment to be then immediately entered on such warrant of attorney, and registered; that they the said plaintiffs would then accept such warrant of attorney from the defendant, and would not issue any execution thereon until the 25th of December, 1848, and would not enforce the said bill as against the said defendant, but would extend the time for payment of the same until the day and year last aforesaid; that the said bill became due and payable on the 22nd of September then last past,

and was then dishonoured by the defendant; that, when the said bill became due and payable, to wit, on the day and year last aforesaid, he, the defendant, in pursuance of the agreement, was, and from thence until the time of pleading the said last-mentioned plea, had been, and still was, ready and willing to give and execute, and then tendered and offered to the plaintiffs, his warrant of attorney for the amount of the said bill, that is to say, for the sum of 575*l.* 1*s.*, and also for all charges and expenses relating to the said warrant of attorney, to be paid on the 25th of December, 1848, and was also then, and from thence until the pleading of the said last-mentioned plea had been, and then still was, ready and willing, and then offered, to allow judgment to be then immediately entered on such warrant of attorney, and registered,—of all which premises, the plaintiffs, to wit, on the day and *year last aforesaid, had due notice, and were then requested by the defendant to accept such warrant of attorney as aforesaid from the defendant, and to extend the time of payment of the said bill until the said 25th of December, 1848; yet that the plaintiffs did not nor would accept the said warrant of attorney from the defendant, but wholly refused and neglected so to do, and then unjustly, and in violation of the said agreement, sought to enforce payment of the said bill of exchange by the defendant; and the defendant then, in and by the said last-mentioned plea, offered and alleged that he was ready to verify the same: That he, the defendant, having so pleaded to the said action as aforesaid, the plaintiffs, afterwards, to wit, on the 8th of November, 1847, in due course, and according to the practice of the said Court, replied to the said pleas of the defendant in the said action, in manner following, that is to say, by joining issue upon the said first plea of the defendant, and replying to the said last plea of the defendant, that the defendant, of his own wrong, and without the cause by the defendant in the said plea alleged, broke his said promise, and did not pay the amount of the said bill in the said first count of the said declaration in the said action mentioned, in manner and form as the plaintiffs had above in the said first count in that behalf complained; and the plaintiff in and by the said replication prayed that the same might be inquired of by the country &c.: That the defendant then, to wit, on the day and year last aforesaid, joined issue upon the said last-mentioned replication: That, issue having been so joined in the said action as aforesaid, such proceedings were thereupon had in the said suit, that afterwards, and before the commencement of this suit, to wit, on the

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18th of November, 1847, at Westminster Hall, in the county of Middlesex, before the Hon. Sir C. Cresswell, Knight, one of the justices of our said lady the *Queen of the Bench at Westminster aforesaid, in the absence and in the place and stead of the Right Hon. Sir Thomas Wilde, Knight, the Chief Justice of the said Court of our said lady the Queen at Westminster aforesaid, the said issues joined between the said parties in the said action, in due course, and according to the practice of the said Court, came on for trial; and at the said last-mentioned time and place came the plaintiffs in their own proper persons, and the defendant, by *H. F. Holt*, his attorney; and the jurors of the jury, being summoned in the said action, also came; who, to speak the truth of the matters in issue in the said action, being chosen, tried, and sworn, according to the form of the statute in such case made and provided, did, as to the first issue joined between the said parties as aforesaid, upon their oath say that he, the defendant, did not promise as in the last count of the said declaration in the said action alleged; and, as to the last issue joined between the said parties as aforesaid, the jurors aforesaid did, upon their oath aforesaid, say that the defendant did not, of his own wrong, or without the cause by the defendant in the said last plea of the defendant alleged, break his said promise, and that the defendant, for the causes by him in his said last plea in that behalf alleged, did not pay the amount of the bill in the said first count of the said declaration in the said action mentioned, in manner and form as in that plea was alleged: That thereupon, afterwards, and after the said trial of the said action, and before the commencement of this suit, to wit, on the 2nd of December, 1847, by the consideration and judgment of the said COURT, it was considered that the plaintiffs should take nothing by their said writ in the said action, but that they should be in mercy &c., and that the defendant should go without day &c.; and, by the like consideration and judgment, it was further considered by the COURT *there that the defendant should recover against the plaintiffs 81*l.* 1*s.* 1*d.* for his costs and charges by him about his defence in that behalf laid out and expended, by the Court there adjudged to the defendant, and with his assent, according to the form of the statute in such case made and provided; and that the defendant should have execution thereof &c., *prout patet*, &c.: That the said bill of exchange in the said first count of the declaration in the said action in which judgment was so given as aforesaid, mentioned, and the said bill of exchange in the first count of the

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declaration in this action mentioned, were one and the same, and not other or different bills of exchange; and that the said supposed account stated in the last count of the declaration in the said action in which judgment was so given as aforesaid, mentioned, and the said account stated in the said last count of the said declaration in this action mentioned, were one and the same account, and not other or different accounts stated; and that the said supposed promises and causes of action in the said declaration in the said action in which judgment was so given as aforesaid, mentioned, and the said promises and causes of action in the declaration in this action mentioned, were the same promises and causes of action, and not other or different promises or causes of action; and this the defendant was ready to verify by the said record; wherefore, the defendant prayed judgment whether the plaintiffs ought to be permitted to implead the defendant for the alleged breach of promises in the said first count of the declaration in this action mentioned, or to say that he, the defendant, promised as in the last count of the said declaration in this action mentioned, &c.

To this plea, the plaintiffs replied, that they, the plaintiffs, ought not to be barred from declaring against the defendant, or from impleading him in respect of the *causes of action in the said first count of the said declaration in this action mentioned, because they said that they, the plaintiffs, did extend the time, and give the defendant time for payment of the bill of exchange in the said first count of the declaration in this action mentioned, until and after the said 25th of December, 1848, and the plaintiffs had not, since the said recovery in the said plea mentioned, until the commencement of this suit, sought to enforce the payment of the bill of exchange in the said first count of the declaration in this action mentioned, and the amount of the bill of exchange was still unpaid to the plaintiffs; that the said 25th of December, 1848, had elapsed and passed long before the commencement of this suit; and that the defendant had not, at any time hitherto, given or executed to the plaintiffs any warrant of attorney for the amount of the said bill, or any part thereof, or otherwise howsoever; and that this the plaintiffs were ready to verify, wherefore the plaintiffs prayed judgment if they ought to be barred from impleading the defendant for the said breach of promise in the said first count of the declaration in this action mentioned.

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As to the second count, there was a *nolle prosequi*.

Special demurrer to the replication to the first count, assigning for

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18th of November, 1847, at Westminster Hall, in the county of Middlesex, before the Hon. Sir C. Cresswell, Knight, one of the justices of our said lady the *Queen of the Bench at Westminster aforesaid, in the absence and in the place and stead of the Right Hon. Sir Thomas Wilde, Knight, the Chief Justice of the said Court of our said lady the Queen at Westminster aforesaid, the said issues joined between the said parties in the said action, in due course, and according to the practice of the said Court, came on for trial; and at the said last-mentioned time and place came the plaintiffs in their own proper persons, and the defendant, by *H. F. Holt*, his attorney; and the jurors of the jury, being summoned in the said action, also came; who, to speak the truth of the matters in issue in the said action, being chosen, tried, and sworn, according to the form of the statute in such case made and provided, did, as to the first issue joined between the said parties as aforesaid, upon their oath say that he, the defendant, did not promise as in the last count of the said declaration in the said action alleged; and, as to the last issue joined between the said parties as aforesaid, the jurors aforesaid did, upon their oath aforesaid, say that the defendant did not, of his own wrong, or without the cause by the defendant in the said last plea of the defendant alleged, break his said promise, and that the defendant, for the causes by him in his said last plea in that behalf alleged, did not pay the amount of the bill in the said first count of the said declaration in the said action mentioned, in manner and form as in that plea was alleged: That thereupon, afterwards, and after the said trial of the said action, and before the commencement of this suit, to wit, on the 2nd of December, 1847, by the consideration and judgment of the said Court, it was considered that the plaintiffs should take nothing by their said writ in the said action, but that they should be in mercy &c., and that the defendant should go without day &c.; and, by the like consideration and judgment, it was further considered by the Court *there that the defendant should recover against the plaintiffs 31*l.* 1*s.* 1*d.* for his costs and charges by him about his defence in that behalf laid out and expended, by the Court there adjudged to the defendant, and with his assent, according to the form of the statute in such case made and provided; and that the defendant should have execution thereof &c., *prout patet*, &c.: That the said bill of exchange in the said first count of the declaration in the said action in which judgment was so given as aforesaid, mentioned, and the said bill of exchange in the first count of the

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warrant of attorney for the amount of the said bill, or that the defendant ever refused to give or execute the said warrant of attorney: that, even had the defendant refused, such refusal would not have conferred upon the plaintiffs the right to declare against the defendant, or implead him, in respect of the causes of action in the said first count of the declaration in this action mentioned, whilst the said judgment remained in force and not reversed.

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Joinder in demurrer.

C. Wood (with whom was *Manning*, Serjt.), in support of the demurrer:

The plea, though perhaps it contains statements that are unnecessary (see 1 Wms. Saund. 5th edit. p. 91 a, n. (2)), is nevertheless a good plea of judgment recovered; and the replication affords no sufficient answer to it. The plea is a good estoppel, and is conclusive; and it is not competent to the plaintiff to show that the judgment is bad: *Trevivan v. Lawrence* (1); *Vooght v. Winch* (2). * * *

The replication admits that the judgment in the former action is good, and stands unreversed, and that the action was brought in respect of the same causes of action as those for which this action is brought. The only answer that is sought to be given to the plea, is, that the plaintiffs did extend and give time for the defendant to pay the bill until after the day named, and that that day had elapsed before the commencement of this suit. That is repugnant to the admission involved in the replication. The replication goes on to allege that the defendant did not give or execute to the plaintiffs a warrant of attorney for the amount of the bill: but it does not state that the defendant was ever called upon to do so, and that he refused. The allegation, therefore, is a negative pregnant with the affirmative that the plaintiffs demanded and the defendant refused to give such warrant of attorney. [He cited *Ripley v. M'Clure* (3).]

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Peacock (with whom was *Hugh Hill*), *contra*:

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The plea is clearly bad. This action was commenced on the 9th of July, 1849; and the answer attempted to be set up, is, that the plaintiffs ought not to be permitted or received to declare against the defendant, or to implead him in respect of the several causes of

(1) 1 Salk. 276; 6 Mod. 256; 2 (3) 80 R. R. 593 (4 Ex. 345); affirmed
Id. Bay. 1036. on error, *M'Clure v. Ripley*, 80 R. R.
(2) 21 R. R. 446 (2 B. & Ald. 662). 606 (5 Ex. 140).

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action in the declaration mentioned, because, before the commencement of this suit, and after the bill of exchange in the first count mentioned became due and payable, and after the making of the promises in the declaration mentioned, to wit, on the 2nd of October, 1847, the plaintiffs impleaded the defendant in the Court of *Queen's Bench in respect of the same bill and causes of action; and because the defendant obtained judgment in that action upon a plea alleging an agreement to suspend the plaintiffs' right to sue in respect of the bill until the 25th of December, 1848.

(MAULE, J.: The plea avers that the causes of action in both actions are identical. Then it appears that an action was brought, and that the defendant pleaded to the action, and obtained a judgment that he go thereof without day. Does not that show a sufficient bar to the present action?)

It is submitted that it does not.

(MAULE, J.: The proper answer to the plea would have been, that the present action was not brought for the same cause as the former. The effect of an agreement to suspend the remedy operating as a total bar, was very much considered in *Ford v. Beech*, in error, where the case of *Stracey v. The Bank of England* (1) was explained and materially qualified (2).)

It sufficiently appears on the face of the pleadings here, that this is not for the same cause of action as the former. An estoppel operates to prevent a party from alleging a fact contrary to what he has before alleged or admitted.

(CRESSWELL, J.: Are you suing in this action for the same cause as in the first action?)

No.

(CRESSWELL, J.: Then, why not traverse the allegation of identity?)

It could not be necessary, when the record as it stands clearly shows that the two causes of action are different. Would it be for the jury to say whether or not the two declarations were the same?

(1) 6 Bing. 754; 4 Moo. & P. 639.

(2) 75 R. R. 651 (11 Q. B. 874).

(MAULE, J. : I think it would.)

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Suppose a first action brought by the plaintiff as executor, and it turned out that he now claimed under letters of administration ?

(CRESSWELL, J. : In that case, he would be a different person : the cause of action would be totally different.)

Robinson's case (1) is an authority to show, *that, in the case put, the judgment in the former action would be no bar to a second.

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Wood, in reply, was stopped by the Court.

MAULE, J. :

It appears to me that the plea in this case is good, and that the replication is a bad one. The action is brought, in the ordinary form, upon a bill of exchange. The plea, in effect, states that the plaintiffs had brought a former action against the defendant for the same cause of action, and that in that action the defendant obtained judgment. The plea goes, perhaps unnecessarily, into a detail of the grounds on which the judgment in the former action was given. I think, that, upon whatever ground that judgment was given, the causes of action being alleged to be the same as in the present case, and that allegation not being traversed, and there being no incongruity in assuming the two causes of action to be the same, the judgment operates as a bar. When a court of competent jurisdiction has given judgment that the defendant go without day, and that judgment remains unreversed, it must be taken to have been rightly given, and the plaintiff cannot have a second action for the same cause. The replication, therefore, in the present case, not denying that the cause of action in respect of which the plaintiffs now declare, was the same as that for which the defendant has obtained judgment, affords no answer to the plea ; and consequently there must be judgment for the defendant.

CRESSWELL, J. :

I am of the same opinion. The plaintiffs have sued and have failed, the defendant having obtained judgment. The declaration in the present action seems to be for the same cause of action as the former : the plea avers that it is so ; and the *replication does not

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deny it. In *Robinson's* case, it appeared upon the face of the pleadings that the two causes of action could not be identical.

TALFOURD, J. :

I am of the same opinion. The causes of action must have been the same or different. If the same, the judgment in the former action is a bar : if different, the allegation of identity might properly be traversed by the replication. The plaintiff not having adopted that very obvious course, there must be judgment for the defendant.

Judgment for the defendant.

1850.

Feb. 11.

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KIDGILL v. MOOR (1).

(9 C. B. 364—380 ; S. C. 19 L. J. C. P. 177 ; 14 Jur. 790.)

A declaration in case by a reversioner alleged that the plaintiff was entitled to a right of way for his tenants over a certain close of the defendant ; and charged that the defendant wrongfully locked, chained, shut, and fastened a certain gate standing in and across the way, and wrongfully kept the same so locked, &c., and thereby obstructed the way ; and that, by means of the premises, the plaintiff was injured in his reversionary estate : Held, on motion in arrest of judgment, that the declaration was sufficient, inasmuch as such an obstruction might occasion injury to the reversion, and it must be assumed, after verdict, that evidence to that effect had been given.

THIS was an action upon the case, by a reversioner, for an obstruction of an alleged right of way.

The declaration stated, that, before and at the time of the committing of the grievances by the defendant as thereafter mentioned, the plaintiff was, and continually from thence hitherto had been, and still remained, seised in his demesne as of fee of and in one undivided seventh part, the whole into seven equal parts to be divided, of a certain close and premises, with the appurtenances, situate in the parish of Bradfield, in the county of Berks, as tenant in common thereof with William Kidgill, &c., the said William Kidgill, &c. *then being possessed of the other six undivided parts of the said close and premises, with the appurtenances ; that the said undivided seventh part of the said close and premises, with the appurtenances, during all the time aforesaid, was, and still remained, in the possession and occupation of Joseph Kidgill, as tenant thereof to the plaintiff, the reversion thereof, expectant on the determination of the said tenancy, then and still belonging to the plaintiff ; and that the plaintiff, during all the time aforesaid, of right ought to have

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(1) *Bell v. Midland R. Co.* (1861) 273 ; *Mayfair Property Co. v. Johnston* 10 C. B. N. S. 287, 306, 30 L. J. C. P. [1894] 1 Ch. 508, 519 ; 63 L. J. Ch. 399.

had, and yet of right ought to have, for his tenants, occupiers of the said undivided seventh part of the said close, &c., a certain way from and out of the said close, unto, into, through, and over a certain other close of the defendant, in the parish aforesaid, from and out of the same, unto and into a certain common and public highway in the county aforesaid, and so back again from the same common and public highway, unto, into, through, and over the said close of the defendant, unto and into the said first-mentioned close and premises, to go, pass, and re-pass, on foot, with horses, waggons, and carriages, every year, and at all times of the year, at their free will and pleasure: yet that the defendant, well knowing the premises, but wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff in his said reversionary estate and interest of and in the said undivided seventh part of the said close and premises, with the appurtenances, whilst the said undivided seventh part of the said close was so in the possession and occupation of the said Joseph Kidgill as tenant thereof to the plaintiff, and whilst he, the plaintiff, was so interested in the said undivided seventh part of the same, as aforesaid, to wit, on the 1st of May, 1849, and on divers days and times between that day and the commencement of this suit, wrongfully and unjustly locked, chained, shut, and fastened a certain gate standing *in and across the said way, and wrongfully and injuriously kept and continued the said gate so locked, chained, shut, and fastened, in and upon the said way, for a long space of time, to wit, from thence until the commencement of this suit, and thereby during all that time wrongfully and injuriously obstructed the said way, by means of which said several premises the plaintiff had been and was greatly injured, prejudiced, and aggrieved in his said reversionary estate and interest of and in the said undivided seventh part of the said close and premises, with the appurtenances, so in the possession of the said Joseph Kidgill as tenant thereof to the plaintiff; and also by means of the committing of the said grievances by the defendant as aforesaid, one J. G. Lewis, who, before the committing of the said grievances by the defendant, had contracted and agreed with the plaintiff for the purchase by him from the plaintiff of the said reversionary estate and interest of the plaintiff, for a large sum of money, to wit, the sum of 300*l.*, and who would otherwise have completed the said purchase, and have paid to the plaintiff the said sum of money, was deterred and prevented from completing the said purchase, and from paying the said sum of money to the

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plaintiff, and from thence continually had wholly declined to complete the said purchase, or to pay the said sum of money, or any part thereof, to the plaintiff; and thereby the plaintiff had been, and still was, hindered and prevented from completing the sale of his said reversionary estate and interest to the said J. G. Lewis, and had thereby not only lost and been deprived of the advantage and emoluments which he would have derived and acquired from the completion of the sale of his said reversionary estate and interest to the said J. G. Lewis, but had been forced and obliged to pay, lay out, and expend divers large sums of money, to wit, the sum of 100*l.*, *in and about the said contract for the sale of his said reversionary estate and interest, and expenses incidental thereto, to the damage of the plaintiff of 200*l.*, &c.

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The defendant pleaded: first, Not guilty; secondly, a plea traversing the seisin of the plaintiff as alleged in the declaration; thirdly, a traverse of the alleged right of way: whereupon issue was joined.

The cause was tried before Rolfe, B., at the Summer Assizes for the county of Berks, in 1849, when a verdict was found for the plaintiff upon all the issues, damages 40*s.*

Whateley, in Michaelmas Term last, obtained a rule *nisi* to arrest the judgment (1), on the ground that the declaration disclosed no cause of action, the alleged obstruction of the right of way not being shown to be an injury of a permanent nature, so as to affect the reversion. He cited *Jesser v. Gifford* (2), *Jackson v. Pesked* (3) *Baxter v. Taylor* (4), *Bright v. Walker* (5), and *Tucker v. Newman* (6).

Keating and *Mattheus* now showed cause :

The complaint here is, that the defendant wrongfully fastened a gate erected across a way leading over the defendant's close; whereby the plaintiff's reversionary estate was injured: and the question will be, whether such an obstruction could, under any circumstances, be an injury to the reversion. One of the earliest authorities upon this subject, is, the case of *Jesser v. Gifford* (2). That was an action for erecting a wall, whereby the plaintiff's

(1) He also moved for a new trial, on the ground that the verdict was against the weight of evidence; but the rule as for a new trial was refused.

(2) 4 Burr. 2141.

(3) 14 R. R. 417 (1 M. & S. 234).

(4) 38 R. R. 227 (4 B. & Ad. 72; 1 Nev. & M. 11).

(5) 40 R. B. 536 (1 Cr. M. & R. 211; 4 Tyr. 509).

(6) 11 Ad. & El. 40.

*lights were obstructed. A motion was made in arrest of judgment, on the ground that the action would not lie by a reversioner, being only an injury to the person in possession. But ASTON, J., afterwards said "he had looked into it, and had found a case *S. P.* with the present; and accordingly cited *Tomlinson v. Brown* (1): it was an action brought by the owner of the inheritance, for a nuisance in obstructing lights and breaking his wall. A general verdict for the plaintiff. *Mr. Norton*, in arrest of judgment, objected that a temporary nuisance cannot be an injury to the inheritance; it may be abated before the estate comes into possession: and he cited *Some v. Barwisk* (2); and observed, that, if this would hold, the defendant would be liable to a double action, one, by the possessor of the estate, the other, by the reversioner. *Mr. Crowle* showed cause on behalf of the plaintiff, and insisted that it was a damage done to the inheritance: if the reversioner wanted to sell the reversion, this would certainly lessen the value of it. The COURT were of opinion that an action might be brought by one in respect of his possession, and by the other in respect of his inheritance, for the injury done to the value of it." And Lord MANSFIELD added: "That is decisive;" and the rule for arresting the judgment was discharged. Can there be any doubt that the erection and fastening of a gate across a way may be as permanent an obstruction to the right, and consequently as great an injury to the reversion, as the building of a wall? This is not like the case of an attempt to gain a right on the plaintiff's land.

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(MAULE, J.: In the case of an obstruction of lights, the house is permanently the worse for it: but, in the case of an obstruction of a right of way, the plaintiff is only injured if he is obstructed at a time *when he wants to exercise his right. It is like a profit *à prendre*: the commoner must show that he wanted to use the common, before he can complain of an obstruction to his right.

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CRESSWELL, J.: Would the mere putting a lock upon the gate, no one appearing ever to have been prevented from passing through, enable the reversioner to bring an action?)

Whether the act done amounted to an obstruction or not, would be for the jury.

(1) E. T. 1755, MS.

(2) Cro. Jac. 231.

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(MAULE, J.: The tenant clearly could not maintain an action, unless he has been actually obstructed. Could the landlord bring an action alleging an injury to the reversion, where there has been no actual obstruction of the tenant?)

It is submitted that he may.

(MAULE, J.: Suppose the plaintiff were tenant in fee in possession, he could maintain no action except in respect of some actual obstruction of his right. Could he in such case acquire a right of action by simply parting with the right of possession?)

After verdict, the Court will assume here an obstruction as permanent as the terms used will admit of. In 1 Wms. Saund. 346 a (1), the learned editors, treating of the action by a commoner for the disturbance of his right, say: "The consumption of the grass by the other cattle, is of itself a diminution of the right and profit of the commoner, and considered as sufficient proof of the damage alleged in the declaration; for, if the other cattle had not been there, the commoner's cattle might have eaten every blade of grass which was consumed by the other. Therefore, it seems sufficient for the plaintiff to prove his right to the common, and that the defendant put upon it cattle, or (if he be another commoner) more cattle than he ought to do. Besides, the law considers that the right of the commoner is injured by such an act, and therefore allows *him to bring an action for it, to prevent a wrong-doer from gaining a right by repeated acts of incroachment: *Wells v. Watling* (2); *Hobson v. Todd* (3); *Pindar v. Wadsworth* (4). For, wherever any act injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right, without proof of any specific injury: and this seems to be a governing principle in cases of this kind. As in the case of *Patrick v. Greenway* (5), which was an action of trespass for fishing in the plaintiff's several fishery: it appeared in evidence that the defendant fished there, but did not take any fish; neither was it alleged in the declaration that the defendant caught any fish: the plaintiff obtained a verdict, which in the following Term (Easter, 1796) the defendant moved to set aside: but the Court of Common Pleas refused even a rule to show

(1) Notes to *Mellor v. Spateman*.

(2) 2 W. Bl. 1233.

(3) 2 R. R. 335 (4 T. R. 71).

(4) 6 R. R. 412 (2 East, 154).

(5) Tried before Lawrence, J., Oxford Spring Assizes, 1796.

cause, upon the ground that the act of fishing was not only an infringement of the plaintiff's right, but would hereafter be evidence of an using and exercising of the right by the defendant, if such an act were overlooked." In *Young v. Spencer* (1), in case by the owner of a house, against his lessee for years, for opening a new door, whereby the house was weakened and injured, and the plaintiff prejudiced in his reversionary estate and interest in the premises,—upon a plea of Not guilty, the jury found that the lessee did open the door without leave, but that the house was not in any respect weakened or injured by it; and the Judge thereupon directed a verdict to be entered for the plaintiff, with nominal damages, subject to a case: and it was held, on argument, that the plaintiff was not, at all events, entitled to *a verdict; but, as the reversionary interest of the plaintiff might be injured, although the house itself was not, and that question had not been submitted to the jury, the COURT ordered a new trial.

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(MAULE, J.: That was waste.)

In *Shadwell v. Hutchinson* (2), it was ruled by Lord TENTERDEN, that a reversioner may maintain an action for a nuisance, which produces no injury to his reversion beyond that to the right, and which may be removed before the reversion comes into possession. If the continuance of the sky-light in that case would injuriously affect the plaintiff's right, surely the same result would follow here from the fastening of the gate.

(CRESSWELL, J.: The putting a lock on the gate, was not necessarily an obstruction of the tenant's free passage.)

After verdict, it must be assumed that the tenant was obstructed. In *Tucker v. Newman* (3), the building of a roof with eaves, and, in *Fay v. Prentice* (4), the erection of a projecting cornice, whereby the rain was discharged on to adjoining premises, was held to be a nuisance from which the law would infer injury to the reversioner of such adjoining premises. Such an obstruction as this, acquiesced in by the reversioner, would afford an answer to a claim of right of way resting upon twenty years' user. He, therefore, clearly must have a right of action, to vindicate his title.

(1) 10 B. & C. 145; 5 Man. & Ry. 47.

and damages recovered for a continuance of the nuisance.

(2) 36 R. R. 497 (2 B. & Ad. 97; Moo. & Mal. 350; 4 Car. & P. 333). In that case, a second action was brought,

(3) 52 R. R. 276 (11 Ad. & El. 40).

(4) 68 R. R. 823 (1 C. B. 828).

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(Gresswell, J.: Could the reversioner maintain an action, where the gate was locked with the permission of his tenant?)

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The act of the tenant, in the absence of knowledge by the reversioner, would not be allowed to prejudice him: *Daniel v. North* (1). BAYLEY, J., in that *case, says: "The tenant cannot bind the inheritance in this case, either by his own positive act, or by his neglect. If, indeed, the landlord had known of these windows having been put out, and had acquiesced in it for twenty years, that would have bound him."

(WILLIAMS, J.: That remark would equally apply to a man assenting to a right of way, or to an obstruction of a right of way.)

No doubt it would.

(WILLIAMS, J.: In *Barter v. Taylor* (2), it was held that a reversioner cannot maintain an action on the case against a stranger for merely entering upon his land held by a tenant on lease, though the entry be made in the exercise of an alleged right of way,—such an act, during the tenancy, not being necessarily injurious to the reversion.)

The ground upon which the decision in that case proceeded, was, that the acts complained of, would not be evidence against the reversioner in support of a claim of right by the trespasser. The question now before the Court is of a totally different character.

(WILLIAMS, J.: In the report of that case in 1 Nev. & Man. 11, PARKE, B., is made to say, "My notion is, that there must be some destruction of the land, to enable the reversioner to maintain this action. No case has ever gone so far as to constitute a simple trespass, like this, an injury to the reversion."

MAULE, J.: My brother PARKE does not say that it would not be evidence, if the party claimed a right of way, and meant to assert it.)

In *Dobson v. Blackmore* (3), there was no permanent injury to the reversion; and the jury negatived actual damage.

(MAULE, J.: To entitle the reversioner to maintain this action, must not the two things concur, viz. an injury of such a nature

(1) 11 East. 372.

Nev. & M. 11).

(2) 38 R. R. 227 (4 B. & Ad. 72; 1

(3) 72 R. R. 493 (9 Q. B. 991).

as will be presumed to be permanent, and the fact of its being evidence against him on a *claim of right? Will the circumstance of its being evidence against him alone suffice? It is clear that no action by the reversioner can be founded upon an act done, during the continuance of the lease, by the permission of the tenant (1). Here, the declaration avers the obstruction to be of such a nature as to be an injury to the reversion. That is clearly the only way in which it can be sustained.)

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In no case has the right to maintain the action been put upon the ground that something had been done to the land itself. In *Shadwell v. Hutchinson*, Lord TENTERDEN puts it on the ground of loss of evidence of the right. In *Hopwood v. Schofield* (2), PATTESON, J., who was one of the Judges who concurred in the decision of *Baxter v. Taylor*, says: "I do not say that a right of way may not be obstructed under such circumstances as would entitle the reversioner to an action on the case: but *Jackson v. Pesked* (3), and all the authorities, show that he can only sue for a permanent injury to the object of his reversionary interest. How can that injury be called permanent, which, it is in evidence, can be redressed in a few days? If, indeed, there had been any obstruction operating in denial of the right, it might have been different." Here, the declaration contains both the allegations, one or other of which was held in *Jackson v. Pesked* to be necessary to make the declaration good: it avers that the obstruction is of a permanent nature, and that the plaintiff is injured by the consequent diminution in value of his reversionary estate. In *Alston v. Scales* (4), a surveyor of highways was held liable in case at the suit of a reversioner, for subtraction of a portion of his bank by the road side, *although the occupying tenant, who was called as a witness, stated that the property was improved by what the surveyor had done.

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Whateley and Piggott, in support of the rule :

To entitle the plaintiff to maintain this action, he must show that his reversion has been injured, and that the injury is of a permanent character. It is not alleged here that the gate was erected by the defendant; but merely, that, being there, he locked it. It is perfectly consistent with that statement, that the

(1) *Quare*, where the tenant of a house is passive while a stranger pulls it down.

(2) 2 Moo. & Rob. 34.

(3) 14 R. R. 417 (1 M. & S. 234).

(4) 35 R. R. 502 (9 Bing. 3).

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defendant locked the gate with the assent of the tenant, and that each had a key.

(CRESSWELL, J.: There is an averment here that the obstruction was permanent, and an injury to the reversion: it must be assumed that the Judge would have told the jury that such a declaration would not be proved by the state of facts you suggest.)

The Court will intend nothing which is not stated. "Nothing can be supplied beyond that of which proof is necessarily involved in the proof of what is alleged:" per Lord DENMAN, in *Davis v. Black* (1). The distinction which will be found to pervade all the cases, is, whether the obstruction is in its nature permanent or not.

(WILLIAMS, J.: What do you mean by permanent?)

The erection of a wall, as in *Jesser v. Gifford*, would be a permanent obstruction: or the building a house across the way. [They contended that *Barter v. Taylor*, *Hopwood v. Schofield*, and *Dobson v. Blackmore*, cited for the plaintiff, showed that the obstruction must be of a permanent nature.]

[376] (WILLIAMS, J.: In the case of *The Prorost and Scholars of Queen's College, Oxford, v. Hallett* (2), it was held that an action on the case for an injury to the inheritance, lies by the reversioner, pending the term, against the tenant, for inclosing and cultivating waste land included *in the demise, and for continuing the grievance. And GROSE, J., said: "Acts of this kind have been held over and over again to be a present injury to the estate of the reversioner.")

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There is a marked distinction between the case which Lord ELLENBOROUGH there puts, of the building of a wall, *Jesser v. Gifford*, and the present case. So, in *Tucker v. Newman*, that which the defendant did, was, in itself, as PATTESON, J., observes, something lasting. That is the distinction which runs through all the cases.

(MAULE, J.: You must show that that which is charged here, could not possibly be an injury to the reversion. It must be taken that the Court of Queen's Bench decided, in *Dobson v. Blackmore*, that proving the declaration in any way would show no cause of

(1) 55 R. 453 (1 Q. B. 900, 911).

(2) 13 R. R. 293 (14 East, 489).

action. The action there was, for obstructing a public way. It was necessary, therefore, to show some particular injury. For anything that appears, there could have been no particular injury.)

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It has been said that the continuance of this gate for twenty years might conclude the plaintiff. That, however, is not so ; for, there could be no enjoyment “ as of right,” as against the reversioner, so long as the land was in the hands of the tenant: *Bright v. Walker* (1). * * *

MAULE, J. :

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I think the declaration in this case, which is objected to after trial and a verdict for the plaintiff, and which alleges that the defendant wrongfully and unjustly locked, chained, and fastened a certain gate in and across a certain way, and wrongfully and injuriously kept and continued the same so locked, chained, and fastened, and so obstructed the way, whereby the plaintiff was injured in his reversionary right and interest, states a cause of action which entitles the plaintiff to damages ; and that we cannot arrest the judgment. It may have been that no evidence was given at the trial, of any such obstruction as could be a permanent injury to the plaintiff's reversion. That might have been ground for a nonsuit, or a verdict for the defendant : but it was not so put at the trial. The only question, therefore, for our consideration, is, whether the plaintiff's reversionary interest might be injured by the acts alleged in this declaration to have been done by the defendant. It appears to me that it might. It is not denied that the erection of a wall across the way, assuming, of course, that there was no contract as between the tenant of the land and the defendant, would be an injury to the reversion, although such wall might be pulled down before the plaintiff became entitled to the actual possession of the land : and I cannot doubt that there might be such a locking and chaining of a gate as would amount to as permanent an injury to the plaintiff's reversionary interest as the building of a wall. The meaning of the allegation, that, by means of the premises, the plaintiff *was greatly injured in his reversionary estate and interest, is not that the injury follows as a consequence of law from what is previously stated, like an allegation that J. S. was seised in fee, and that he died so seised, whereby J. T., his son and heir-at-law, became entitled : but it is an allegation of a matter

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of fact, as was lately held in this Court, in the case of *Brown v. Mallett* (1), which is for the jury to find, or not, according to the evidence. I therefore think, upon the whole, that the declaration is sufficient.

CRESSWELL, J.:

I have entertained a good deal of doubt during the progress of the argument: but I concur in the judgment which has been pronounced by my brother MAULE. *Jackson v. Pesked* decides that a declaration of this sort is insufficient unless it contain an averment that the acts charged injured the plaintiff's reversionary interest. That case, however, impliedly recognises the validity of a declaration which contains such an averment, and states facts which may or may not amount to such injury of the reversion. Here, the declaration alleges certain things to have been done by the defendant, so as to occasion injury to the plaintiff's reversionary interest. I agree with my brother MAULE that that is an allegation of fact, and that we must take it to have been proved, if the facts stated could so operate. It is impossible to say that a gate *may* not be so fastened as to enure as an injury to the reversion.

WILLIAMS, J.:

I am of the same opinion. If in point of fact the obstruction complained of took place under such circumstances as not to occasion any permanent injury to the plaintiff's reversion, the Judge ought to have directed the jury to find for the defendant. The learned Judge, however, did not so direct the jury: and no complaint is made on that score. We must, *therefore assume such a state of facts to have been proved as might exist consistently with what is charged in this declaration as being an injury to the plaintiff's reversion. There is clearly no ground for arresting the judgment.

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Rule discharged.

(1) 75 B. R. 806 (5 C. B. 599).

BARNES v. WARD (1).

(9 C. B. 392—421; S. C. 19 L. J. C. P. 195; 14 Jur. 334; 2 Car. & K. 661.)

1850.
Feb. 25.
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A. being possessed of land abutting on a public footway, in the course of building a house on such land, excavated an area, which, by the negligence of his workpeople, was left unfenced, so that B., who was lawfully passing along the way, the night being dark, without any negligence or default of her own, fell into the area, and was killed: Held, that A. was liable, under Lord Campbell's Act, to an action by the husband, as administrator, for the benefit of himself and B.'s infant children.

The declaration alleged that the defendant was possessed of a messuage, with the appurtenances, near to a common and public footway, and that, in front of and before the said messuage, and parcel of the appurtenances thereof, and close to, and by the side of, the said footway, and abutting upon, and opening into, the same, there then was a large hole, vault, or area, which hole, vault, or area, the defendant, by reason of the possession of the said messuage, with the appurtenances, before and at the time when &c., ought to have so sufficiently guarded and fenced as to prevent injury to persons lawfully passing in and along the said footway: Held, that the duty of the defendant to fence the area was properly alleged.

In such a case, the declaration need not negative the existence of any relations entitled to compensation, other than those on whose behalf the action purports to be brought.

THIS was an action upon the case brought by the plaintiff as administrator of Jane Barnes, deceased, under Lord Campbell's Act, 9 & 10 Vict. c. 93, *intituled "An Act for compensating the families of persons killed by accident," to recover damages from the defendant, the owner of land adjoining a public footway, for negligence in leaving unfenced an excavation on his land, and thereby causing the death of the intestate.

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The declaration alleged that the defendant, before and at the time, &c., was possessed of a messuage, with the appurtenances, near to a common and public footway, in front of and before which said messuage, and parcel of the appurtenances thereof, and close to and by the side of the said footway, and abutting upon and opening into the same, there then was a large hole, vault, pit, or area, which said hole, vault, pit, or area, the defendant by reason of the possession of the said messuage (with the appurtenances (2)), before and at the said time when &c., ought to have so sufficiently guarded, fenced off, and railed in, as to prevent damage or injury to any person or persons lawfully passing in and along the said footway: yet that the defendant, whilst he was so possessed of the said messuage, and the said hole, vault, pit, or area, and premises,

(1) Cited in *Hadley v. Taylor* (1865) L. R. 1 C. P. 53, 55, 13 L. T. 368; *Ponting v. Noakes* [1894] 2 Q. B. 281, 286, 291, 63 L. J. Q. B. 549; and cp. *Corby v. Hill* (1858) 4 C. B. N. S. 556, 27 L. J. C. P. 318.

(2) These words were added on amendment at Nisi Prius.

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with the appurtenances, and whilst there was such hole, vault, pit, or area, on &c., wrongfully, and contrary to his duty in that behalf, permitted and suffered the said hole, vault, pit, or area to be and continue, and the same was then, so wholly unguarded, and not fenced off or railed in, that, by *means of the premises, and for want of proper and sufficient guarding, fencing off, and railing in of the same, the said Jane Barnes, who was lawfully passing in and upon the said footway, slipped and fell into the said hole, vault, pit, or area, and was thereby killed: To the damage, &c.: And thereupon the plaintiff, as such administrator as aforesaid, for the benefit of himself, the husband of the said Jane Barnes, and of Jane Barnes, her infant daughter, of the age of ten years, and of Elizabeth Barnes, her infant daughter, of the age of eight years, and of Robert Barnes, her infant son, of the age of six years, according to the form of the statute in such case made and provided, brought his suit &c. *Profert* of letters of administration.

The defendant pleaded: first, Not guilty; secondly, that he was not possessed of the said messuage, with the appurtenances, in manner and form, &c.; thirdly, that he ought not, by reason of his possession of the said messuage, with the appurtenances, to have guarded, fenced off, and railed in the said hole, vault, pit, or area, in manner and form, &c.

On these pleas, the plaintiff joined issue.

The cause was tried before Coltman, J., at the sittings at Westminster after Easter Term, 1847. The facts were as follows: The deceased, Jane Barnes, between eight and nine o'clock in the evening of the 26th of October, was proceeding, in company with her sister and a child, along an unfinished pathway near a row of houses then in the course of erection by the defendant, a builder, called Victoria Grove Terrace, in the Uxbridge Road. It being dark, and no light near, the deceased accidentally fell down the area in front of one of the houses, and died shortly afterwards, from the injuries she thus sustained. It appeared that the deceased was sober at the time of the accident, and that there was no fence to guard the area, but merely a low stone coping *for the reception of iron railings. It further appeared that there had always been a thoroughfare; but the evidence as to the particular part of the newly formed road which had constituted the antient pathway, was somewhat confused. The land belonged to the Bishop of London, by whom it had been leased for terms of years to various persons' under one of whom the defendant held the premises in question.

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On the part of the defendant, it was contended: first, that there was no sufficient evidence that the footpath was a public way; secondly, that a man has a right to excavate his own land to its extremity, and there is no common law obligation upon him to fence or guard such excavation, even though it abut upon a highway; thirdly, that the third issue was not, in its terms, sustained by the evidence.

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The learned Judge told the jury, that, if there was a public way abutting on the area, and it would be dangerous to persons passing, unless fenced, or, if there was a public way so near that it would produce danger to the public, unless fenced, the defendant would be liable, unless the accident was occasioned by want of ordinary caution on the part of the deceased.

The jury found that there was an immemorial public way abutting on the area; and they returned a verdict for the plaintiff, damages 300*l.*, being 100*l.* to the husband of the deceased, 75*l.* each to her two infant daughters, and 50*l.* to her son.

Byles, Serjt., in Trinity Term, 1847, pursuant to leave reserved to him at the trial, moved for a rule to show cause why this verdict should not be set aside, and a verdict entered for the defendant; or why there should not be a new trial, on the ground of misdirection, and that the verdict was against evidence; or why the judgment should not be arrested.

No such duty is cast by the common law upon the owner of land adjoining a public way, under the circumstances disclosed, as is sought to be enforced by this action. The various provisions of the local Acts for the districts surrounding London, and also the 70th section of the general Highway Act, 5 & 6 Will. IV. c. 50, show that the interference of the Legislature was necessary for the protection of the public in these cases. In *Trower v. Chadwick* (1), it was held that the mere circumstance of juxta-position does not render it necessary for a person who pulls down his wall, to give notice of his intention to the owner of an adjoining wall: nor, if he be ignorant of the existence of the adjoining wall, as, where it is under ground, is he bound to use extraordinary caution in pulling down his own.

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(MAULE, J., referred to *Jarvis v. Dean* (2). There, in an action on the case *for an injury resulting to the plaintiff from falling

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(1) 43 R. B. 659 (3 Bing. N. C. 334; (2) 11 Moore, 354; 3 Bing. 447.
6 Bing. N. C. 1; 8 Scott, 1).

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down an unprotected area, the declaration stated that the defendant was possessed of the premises, and that they were adjoining "a certain common and public street and highway." It appeared that the defendant had agreed with the owner of the premises (two carcasses of houses) to finish one of them, for doing which he was to have the other; and that workmen employed by him were then actually at work upon them: but it did not appear that any conveyance had been made to him. The street in question, which had been forming for six years, and led from a public street to a new road across fields, over which the way had been publicly used for five or six years, was unfinished, one half only being lighted, the other neither lighted nor paved: but the inhabitants had paid the highway and paving rates. And it was held that this was sufficient evidence to go to a jury, of a possession in the defendant, and of a dedication of the street to the public.)

The statute gives this remedy only if the circumstances are such as would have enabled the deceased person to bring an action, in case death had not ensued. The 1st section recites that "no action at law is now maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him:" and it then enacts, "that, whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages, in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the *death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." The declaration should have alleged, that, if death had not ensued, the deceased would have been entitled to damages, or it should have stated circumstances whence the Court might have seen that that was so. For any thing that appears, although the defendant may have been guilty of a breach of duty, which may have rendered him liable to a penalty, no action could have been brought by the deceased or her husband.

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(MAULE, J.: A neglect of a public duty, from which a private injury results, gives a good cause of action. This is in truth the same point as the first.)

This action is brought for the benefit of the husband and the three children of the deceased. * * The declaration should have negatived the existence of any parent, or other relative of the deceased, than those named.

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(MAULE, J.: Did it appear that there was any other person entitled?)

No.

(MAULE, J.: Then, I do not see how the defendant can be injured by the supposed omission.)

There was no evidence to go to the jury of the existence of a public footway abutting upon the area in question. This was a new road. There was no evidence of its dedication to the public. There could be no dedication by the termors: *Bright v. Walker* (1). And it may be doubtful whether the Bishop of London, who was a mere tenant for life, could dedicate a way to the public.

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(COLTMAN, J.: The Bishop was tenant in fee, and not for life.)

The duty is alleged to have arisen "by reason of the possession of the said messuage," not by reason of the possession of the area. Upon this objection being taken at the trial, the learned Judge allowed the declaration to be amended, by the addition of the words "with the appurtenances," subject to an application to the Court.

(MAULE, J.: Is not that rather an allegation of fact, that there were such circumstances attending the defendant's possession of the premises, as to render it his duty to guard the area? Does not "messuage" comprehend the area?)

Not in this declaration, which describes the area as being "parcel of the appurtenances of the messuage." The amendment entirely changes the duty.

If this verdict stands, a difficulty will arise as to the appropriation of that portion of the money which is awarded to the children.

WILDE, Ch. J.:

We all think the amendment was properly allowed. The 3 & 4 Will. IV. c. 42, s. 23, provides for the case of an amendment that may prejudice the opposite party in his defence, by allowing him

(1) 40 B. R. 536 (1 Cr. M. & B. 211; 4 Tyr. 509).

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to ask for a postponement of the trial. None was asked for here. And, in truth, the question tried seems to be the very question the parties came prepared to try. As to defendant's duty to fence the area, and also as to the *evidence of the existence of the footway, we think the rule may go. With regard to the distribution of the damages, we think we have no authority to interfere. The statute seems to have been somewhat imperfectly framed in that respect: but the shares of the children will of course be subject to equities, which may be enforced in the proper place.

Montagu Chambers and Hugh Hill showed cause (1):

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It is the duty of every man who makes an excavation on his own land, near to a public way, so to fence and guard it as to prevent injury to persons passing in the exercise of a public right. One of the earliest authorities upon this subject, is, *Blithe v. Topham* (2), which will probably be relied on by the other side. It is there said, that, if A., being seised of a waste adjoining a highway, digs a pit in the waste, within thirty-six feet of the way, and the mare of B. escapes into the waste, and falls into the pit, and is killed, yet B. shall not have an action against A.; because the making of the pit in the waste, and not in the highway, was no wrong to B., but it was by the default of B. himself that his mare escaped into the waste. There, as is observed by GIBBS, Ch. J., in *Deane v. Clayton* (3), "the defendant was held not to be answerable for the damage done to the plaintiff's mare, because the mare had no right to be on the land where the pit, into which she fell, was dug:" and it is to be observed also that the pit was at the distance of thirty-six feet from the highway. "The difference," as is said by DALLAS, J., in the same case (4), "is, between absolute and relative rights, *between that which is mine, exclusive of any right in others, present and future, and that which is of a spreading, shifting possession, as, air, water, &c., in which I have but a qualified possession, a possession subservient to the future use by others. If I place a log across a public path, and injury be thereby sustained, the soil being my own, but the public, or individuals, having a right over it, an action will lie, because there is a right in others to pass

(1) On the 11th of November, 1848, the Judges present being, Coltman, J., Maule, J., and Williams, J.; Wilde, Ch. J. being absent on account of indisposition.

(2) 1 Roll. Abr. Action sur Case (N.)

(translated, 1 Vin. Abr. 554, pl. 4); S. C. Cro. Jac. 158.

(3) 18 R. R. 589 (7 Taunt. 532).

(4) 18 R. R. 580 (*Deane v. Clayton*, 7 Taunt. 522).

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along without interruption : but, if there be no right of way, I may, with any view, and for any purpose, place logs on my own land, and a party having no right to be there, and sustaining damage by his own trespass, cannot bring an action for the damage so sustained."

In *Coupland v. Hardingham* (1), which was an action upon the case for negligence in not railing in or guarding an area before the defendant's house in Wood Street, Westminster, whereby the plaintiff fell down into the area, and was severely hurt, it appeared, that, before the defendant's house, there was an area which was descended to by three steps from the street, and from which there was a door leading into the basement story of the house ; that there was no railing or fence to guard the area from the street ; and that the plaintiff, passing by on a dark night, fell into it, and broke his arm. The defence set up was, that the premises had been in exactly the same situation as far back as could be remembered, and many years before the defendant was in possession of them. But Lord ELLENBOROUGH held, that, however long the premises might have been in this situation, as soon as the defendant took possession of them, he was bound to guard against the danger to which the public had been before exposed ; and that he was liable for *the consequence of having neglected to do so, in the same manner as if he himself had originated the nuisance. And his Lordship added, "The area belongs to the house ; and it is a duty which the law casts upon the occupier of the house, to render it secure." [They also cited *Jarvis v. Dean* (2), *Sarch v. Blackburn* (3), and *Brock v. Copeland* (4).] In *Townsend v. Wathen* (5), it was held to be actionable, to bait traps on a man's own premises, so that his neighbour's dogs were lured to them and injured.

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(CRESSWELL, J.: There was no bait, no temptation, held out here ; therefore that case has no application.)

The case of *Dixon v. Bell* (6) places the duty, in cases of this sort, in a very strong light. It was there held, that the law requires of persons having in their custody instruments of danger, that they should keep them with the utmost care : therefore, where the defendant, being possessed of a loaded gun, sent a young girl (of the age of thirteen or fourteen) to fetch it, with directions to take the

(1) 14 R. R. 764 (3 Camp. 398).

(2) 11 Moore, 354 ; 3 Bing. 447.

(3) 34 R. R. 805 (4 Car. & P. 297 ;

Moo. & Mal. 505).

(4) 5 R. R. 730 (1 Esp. N. P. C. 203).

(5) 9 R. R. 553 (9 East, 277).

(6) 17 R. R. 308 (5 M. & S. 198).

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priming out, which was accordingly done, and a damage accrued to the plaintiff's son in consequence of the girl's presenting the gun at him, and drawing the trigger, when the gun went off,—it was held that the defendant was liable. Wherever a neighbour has acquired a right of easement, the owner of the adjoining property cannot so use his land as in any way to prejudice or affect that right: *Cooper v. Barber* (1): and that applies as well to public rights as to private easements.

The declaration is perfectly good in point of form,—and would have been so, even if the action had been brought by Jane Barnes herself. The duty is well alleged, as also the breach. * * *

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Byles, Serjt., and Ogle, in support of the rule :

Three propositions will be sought to be established in this case, on the part of the defendant: first, that there is no common law duty upon an owner of land adjoining a highway, to guard or fence a ditch or area upon his own land; secondly, that, if there be any such common law duty, it is not properly alleged in this declaration; thirdly, that the learned Judge who tried the cause ought to have told the jury that there was no evidence that the place in question was a public way.

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1. There are many instances of roads passing along the sides of ditches or excavations; but it has never been suggested that the owner of the land on which the ditch or excavation is situate, was bound to fence it; nor is there any instance to be found of an indictment for not doing so. In *Rex v. Whitney* (2), it was sought to impose such a liability upon the parish; but without success. The language of the 5 & 6 Will. IV. c. 70, s. 50, shows that the interposition of the Legislature was found necessary, to prevent inconveniences of that sort. The *onus* of showing the liability to fence, rests upon the *plaintiff: and no authority has been cited that bears very much in his favour. The cases which approach the nearest to this, are, *Coupland v. Hardingham* and *Jarvis v. Dean*: but, in both, the area was constructed in or under the public way,—which materially distinguishes those cases from the present. *Blithe v. Topham* is an authority for the defendant.

(WILLIAMS, J., referred to *Sybray v. White* (3).)

There, the mine into the shaft of which the plaintiff's horse fell,

(1) 12 R. R. 604 (3 Taunt. 99).

(3) 46 R. R. 342 (1 M. & W. 435).

(2) 42 R. R. 329 (7 Car. & P. 208).

was in the possession of the defendant, the plaintiff being possessed of the surface. [They cited *Jordin v. Crump* (1).]

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(WILLIAMS, J., referred to *Bird v. Holbrook* (2).)

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That case has not been universally approved.

(MAULE, J. : The distinction between those cases and the present, is this,—the nature and office of a dog-spear or a spring gun, is, *to kill or maim ; whereas, an area is a necessary convenience to a house.)

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2. The declaration does not, upon the face of it, disclose a cause of action. It does not allege that the action would have lain, if death had not ensued. The plaintiff was bound to make the allegation, to bring himself within the statute, so as to enable the defendant to traverse it.

(MAULE, J. : To entitle the administrator to sue under this statute, it must appear, either by direct allegation, or by necessary inference, that the husband of the deceased could have maintained an action for any injury she had sustained which did not terminate in her death.)

This declaration does not show that. Further, the declaration should have alleged the duty to have arisen by reason of the defendant's possession of the area, and not by reason of his possession of the messuage ; and the objection is not cured by the addition of the words, "with the appurtenances."

3. There was no evidence to go to the jury, that the way in question was a public way. It appeared to have been used by the public for about twenty-five years ; but beyond that there was no evidence.

(WILLIAMS, J. : Was there no evidence of the origin of the road ?)

None whatever. And the circumstance of the land having been during all the time held under leases from the Bishop of London, rebuts the ordinary presumption.

(MAULE, J. : Might not the Bishop grant a way ?)

(1) 8 M. & W. 782.

(2) 29 R. R. 657 (4 Bing. 628 ; 1 M. & P. 607).

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who has land closely adjoining my land, cannot dig so near mine that mine would fall into his pit; and an action brought for such an act would lie.' 'It may be true,' said Lord TENTERDEN, in delivering the judgment of the Court of King's Bench, in *Wyatt v. Harrison* (1), 'that, if my land adjoins that of another, and I have not, by building, increased the weight upon my soil, and my neighbour digs in his land, so as to occasion mine to fall in, he may be liable to an action.' By the civil law, this right of support from the neighbouring soil, was recognised in the restrictions it imposed upon the doing such acts as would naturally have the effect of withdrawing such support, 'If a man dig a sepulchre, or a ditch, he shall leave (between it and his neighbour's land) a space equal to its depth; if he dig a well, he shall leave the space of a fathom' (2).

(WILLIAMS, J.: Suppose there be a public right of way across a field, and the owner of the land excavates the soil so as to form a precipice on either side, leaving the pathway untouched, would he be guilty of a nuisance?)

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That would, in effect, render the way impassable. The only authority that materially *presses the defendant, is *Coupland v. Hardingham*: and there the area is alleged to have been in the highway.

(COLTMAN, J.: We have procured the record in that case; it appears that there were two counts in the declaration, the one charging that the cellar was *adjoining*, the other that it was *on* the highway.

WILLIAMS, J.: If it was *on* the highway, the defendant could not fence it without being guilty of an indictable nuisance.

WILDE, Ch. J.: The presumption would be, that the excavation of the areas in Wood Street was coeval with the dedication of the way to the public.)

So, in *Jarvis v. Dean*, it does not clearly appear that the area was not in the highway: besides, the point was not discussed there.

(CRESSWELL, J.: Here is an antient road, with a modern excavation. May not the public acquire a right something analogous to

(1) 37 B. B. 566 (3 B. & Ad. 871).

(2) L. 13 ff. fin. reg.

the servitude of the old Roman law, viz. that the land adjoining shall be left in such a state as to protect the public in the use of the highway?)

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No trace of any such distinction is to be found in the books.

If liable at all, the defendant can only be so in respect of his possession of the area.

(CRESSWELL, J.: Is it not part of the appurtenances?)

Clearly not. The declaration in substance is, that the defendant, by reason of his possession of Blackacre and Whiteacre, is bound to fence. That, however, is not so: the liability, if any, arises only by reason of the possession of Whiteacre, the excavated place. In *Ricketts v. Salwey* (1), in an action for disturbance of the plaintiff's right of common, the declaration stated that he was possessed of a messuage and land, with the appurtenances, and by reason thereof ought to have common of pasture, &c.: and it was held that this allegation was divisible, and that proof that the plaintiff was possessed of land only, and entitled to the right of common in respect of it, was sufficient to entitle him to damages *pro tanto*.

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(WILDE, Ch. J.: In *Root v. Wilson* (2), A. sent his horse, for the night, to B., who turned it out, after dark, into his pasture-field, adjoining to and separated from a field of C. by a fence, which C. was bound to repair: the horse, in consequence of the bad state of the fence, fell from the one field into the other, and was killed: and it was held, that B., although a gratuitous bailee, might maintain an action against C., and recover the value of the horse.)

There is clearly a variance here between the duty alleged, and the duty proved: *Yarly v. Turnock* (3).

Cur. adv. vult.

MAULE, J., now delivered the judgment of the Court:

This was an action on the case founded on the statute 9 & 10 Vict. c. 93, "An Act for compensating the families of persons killed by accident," and brought by the administrator of *Jana Barnes*.

(1) 22 R. R. 800 (2 B. & Ald. 331; (2) 13 R. R. 431 (1 B. & Ald. 59).
1 Chitty, 104).

(3) Palmer, 269.

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The declaration (as amended during the trial) alleged that the defendant, before and at the time when &c., was possessed of a messuage, with the appurtenances, near to a common and public foot-way, in front and before which said messuage, and parcel of the appurtenances thereof, and close to and by the side of the said foot-way, and abutting upon and opening into the same, there then was a large hole, vault, pit, or area, which hole, &c., the defendant, by reason of the possession of the said messuage, with the appurtenances, before and at the said time when &c., ought to have so sufficiently guarded, fenced off, and railed in, as to prevent damage or injury to any person or persons lawfully passing in or along the said foot-way; yet that the defendant, while *he was so possessed of the said messuage, and the said hole, &c., and premises, with the appurtenances, and whilst there was such hole, &c., on &c., wrongfully, and contrary to his duty in that behalf, permitted and suffered the said hole, &c., to be and continue, and the same was then, so wholly unguarded and not fenced off or railed in, that, by means of the premises, and for want of proper and sufficient guarding, fencing off, and railing in of the same, the said Jane Barnes, who was lawfully passing in and upon the said foot-way, slipped and fell into the said hole, &c., and was thereby killed.

The defendant pleaded: first, Not guilty; secondly, that he was not possessed of the said messuage, with the appurtenances, in manner and form, &c.; thirdly, that he ought not, by reason of his possession of the said messuage, &c., with the appurtenances, to have guarded, fenced off, and railed in the said hole, &c., in manner and form, &c.: on which pleas issues were respectively joined.

At the trial, before Coltman, J., at the sittings in Middlesex, after Easter Term, 1847, it appeared that Jane Barnes was passing, between eight and nine o'clock at night, on the 26th of October, 1849 [*sic*] (1), along a road which had on the one side of it a dead wall, and on the other a row of houses, some of which were finished and some unfinished. It being dark, and no light near, she accidentally fell from a path which was on the road by the side of the houses, into the open area of one of the unfinished ones, which was shown to have been at that time in the possession of the defendant, and was killed by the fall. The area was separated from the path by a kerbstone which was intended for the reception of upright iron rails.

(1) *Qu.* as to the dates. 1849 would seem a misprint for 1846; but the Law Journal report says Easter Term 1848 and the 26th of Oct. 1847.—F. P.

On the part of the defendant, it was contended, first, that there was no sufficient evidence that the foot-path was a public way; secondly, that a man has a *right to make a hole in his own ground, and is not bound to fence an adjoining highway against such a hole; thirdly, that the third issue was not sustained, in its terms, by the evidence.

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The learned Judge told the jury, that, if there was a public way abutting on the area, and it would be dangerous to persons passing, unless fenced, or a public way so near that it would produce danger to the public, unless fenced, the defendant would be liable, unless the accident was occasioned by want of ordinary caution on the part of the deceased.

The jury found that there was an immemorial public way abutting on the area, and gave a verdict for the plaintiff, with 300*l.* damages.

The learned Judge having given leave to the counsel for the defendant to move the Court, on the points suggested by him, a rule was obtained accordingly, to show cause why a nonsuit should not be entered; and, further, why the judgment should not be arrested, on the ground that the declaration disclosed no good cause of action.

On the argument of this rule, before my brothers Coltman, and Williams, and myself, it was contended, on behalf of the defendant, first, that the evidence on the part of the plaintiff furnished no case for the consideration of the jury, as to the existence of an immemorial public foot-way; secondly, that the obligation of the defendant to fence off the area, was not properly described in the declaration; thirdly, that no such obligation existed as that alleged: for, that the owner of land is not bound to fence off an excavation in it by the side of a public road.

As to the first point, the COURT was clearly of opinion that there was sufficient evidence to go to the jury, as to the existence of a public foot-way from time immemorial.

As to the second point, the objection was, that the liability of the defendant was alleged to exist in respect of the house and the appurtenances; whereas, on the evidence, it appeared to exist, if at all, by reason of the possession of the appurtenances alone, *i.e.* of the area. But the COURT was of opinion that the declaration might be regarded as truly describing the origin of the liability of the defendant, viz. that he was in the possession of a house, to which an area appertained, abutting on a public foot-way.

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On the third point, however, the COURT felt so much doubt and difficulty, that a second argument was directed, which took place in Easter Term last, before Wilde, Ch. J., Coltman, J., Cresswell, J., and V. Williams, J.

The arguments for the plaintiff were, that, when a public way has existed from time immemorial, the public have a right to enjoy it with ease and security; and that, if a man prevents that enjoyment, even by the use of his own property, he is responsible as for a public nuisance. And the case was put, of the proprietor of land over which a public way passes, excavating his land on each side thereof, so as to leave the line of way running between two precipices; which, it was argued, would, in effect, make the way impassable, and therefore be a public nuisance. And the cases of *Coupland v. Hardingham* (1) and *Jarris v. Dean* (2) were cited.

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Coupland v. Hardingham was an action on the case for negligence, in not railing in or guarding an area before a house in Westminster, whereby the plaintiff fell down into the area, and was severely hurt. The defence was, that the premises had been in the same condition as far back as could be remembered, and before the defendant became possessed of them. But Lord *ELLENBOROUGH held, that, however long the premises might have been in this condition, as soon as the defendant took possession of them he was bound to guard against the danger to which the public had before been exposed; and that he was liable for the consequences of having neglected so to do, in the same manner as if he himself had originated the nuisance: and the learned Judge said that the area belonged to the house, and it was a duty which the law cast upon the occupier of the house, to render it secure.

Jarris v. Dean was also an action on the case to recover damages for an injury occasioned to the plaintiff by his falling at night into an area, which the declaration alleged the defendant wrongfully and negligently to have left open at a house he possessed, in the parish of Islington, and in, near, and adjoining a certain street there, which was a common highway. The only point of law decided in the cause, was, as to whether the evidence sufficiently proved a dedication of the road to the public. And the case is only an authority on the present subject, to this extent, viz. that it appears to have been assumed as a matter beyond dispute, that the action was well founded, supposing the road was shown to have been a public one.

(1) 14 R. R. 764 (3 Camp. 398).

(2) 3 Bing. 447; 11 Moore, 354.

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On the part of the defendant, it was argued, that no use which a man chooses to make of his own property, can amount to a nuisance to a public or private right, unless it in some way interferes with the lawful enjoyment of that right; that, in the present case, the excavation of the area in no manner interfered with the way itself, or was in any sense hurtful or perilous to those who confined themselves to the lawful enjoyment of the right of way; and that it was only to those who, like the deceased, committed a trespass, by deviating on to the adjoining land, that the existence of the area, though *not fenced, could be in any degree detrimental or dangerous.

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In support of this view of the subject, reliance was placed on the case of *Blythe v. Topham* (1), where it was held, that, if A., seised of a waste adjacent to a highway, digs a pit in the waste, within thirty-six feet of the highway, and the mare of B. escapes into the waste, and falls into the pit, and dies there; yet B. shall not have an action against A., because the making of the pit in the waste, and not in the highway, was not any wrong to B.; but it was the default of B. himself that his mare escaped into the waste. And, in further support of this doctrine, a passage was cited from the judgment of ALDERSON, B., in *Jordin v. Crump* (2), where the case is put of a man, who, passing in the dark along a foot-path, should happen to fall into a pit dug in the adjoining field, by the owner of it. "In such a case," says the learned Judge (3), "the party digging the pit would be responsible for the injury, if the pit were dug across the road; but, if it were only in an adjacent field, the case would be very different, for, the falling into it would be the act of the injured party himself." And, as to the case of *Coupland v. Hardingham*, it was not only denied to be law, by the counsel for the defendant, but it was further argued, that, in that case, as appeared by the original Nisi Prius record, procured by COLTMAN, J., as also in *Jarvis v. Dean*, the area was in one count alleged to be in the highway.

But it seems clear to us, that, in each of these cases, the area in question was not parcel of the road, but was an area meant to be fenced off from it, in the ordinary way, by upright iron rails, so as to exclude the public *from it, in a manner quite inconsistent with the notion of its being itself a part of the highway. And, with respect to the case of *Blythe v. Topham*, and the passage cited from the judgment in *Jordin v. Crump*, it must be observed, that, in these

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(1) 1 Roll. Abr. 88; Cro. Jac. 158.

(3) *Ib.* 788.

(2) 8 M. & W. 782.

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instances, the existence of the pit in the waste or field adjoining the road, is not said to have been dangerous to the persons or cattle of those who passed along the road, if ordinary caution were employed.

In the present case, the jury expressly found the way to have existed immemorially; and they must be taken to have found that the state of the area made the way dangerous for those passing along it, and that the deceased was using ordinary caution in the exercise of the right of way, at the time the accident happened.

The result is, considering that the present case refers to a newly-made excavation adjoining an immemorial public way, which rendered the way unsafe to those who used it with ordinary care, it appears to us after much consideration, that the defendant, in having made that excavation, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road; for, the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public, is, in effect, as much impeded as in the case of an ordinary nuisance to a highway.

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With regard to the objection, that the deceased was a trespasser on the defendant's land at the time the injury was sustained, it by no means follows from this circumstance that the action cannot be maintained. A trespasser is liable to an action for the injury which he does: but he does not forfeit his right of action for an injury sustained. Thus, in the case of *Bird v. Holbrook* (1), the plaintiff was a trespasser, and, indeed *a voluntary one, but he was held entitled to an action for an injury sustained in consequence of the wrongful act of the defendant, without any want of ordinary caution on the part of the plaintiff, although the injury would not have occurred, if the plaintiff had not trespassed on the defendant's land. This decision was approved of in *Lynch v. Nurdin* (2), and also in the case of *Jordin v. Crump*, in which the Court, though expressing a doubt as to whether the act of the defendant in setting a spring-gun was illegal, agreed, that, if it were, the fact of the plaintiff's being a trespasser would be no answer to the action.

For these reasons, we are of opinion that the declaration in this case discloses a good cause of action; and also that the third issue was properly found for the plaintiff.

The rule, therefore, must be discharged.

Rule discharged.

(1) 29 R. R. 657 (4 Bing. 628; 1 Moo. & P. 607). (2) 55 R. R. 191 (1 Q. B. 37).

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(9 C. B. 479—493 ; S. C. 19 L. J. C. P. 261 ; 14 Jur. 553.)

1850.
Feb. 25.

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The plaintiff declared against the defendant for an alleged infringement of a patent for "improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used when transmuting and measuring gas." The defendant pleaded, fourthly, that the plaintiff did not particularly describe his invention, and in what manner the same was to be performed, &c. ; sixthly, that the invention described in the specification, was a different invention from that for which the letters-patent were granted, by reason whereof the letters-patent were void. At the trial, the plaintiff put in a specification, the title of which described the invention to be of "improvements in the manufacture of gas for illumination, and in the apparatus used therein and when transmitting and measuring gas;" and which stated it to relate, "first, to a mode of manufacturing gas for the purpose of illumination; secondly, to improvements in setting and heating clay retorts for making coal-gas; thirdly, to a mode of manufacturing clay retorts; fourthly, to improvements in apparatus for measuring gas when it is being transmitted to the consumer:"

Held that there was a material variance between the invention specified, and that described in the title of letters-patent; and, consequently, that the letters-patent were void; and that the objection was available under either the fourth or the sixth plea.

THIS was an action upon the case for the infringement of a patent.

The declaration stated that the plaintiff and one William Richards, before and at the time of the making of the letters-patent, and of the committing of the grievances by the defendant as thereafter mentioned, were the true and first inventors of certain "improvements in the manufacture of gas for the purpose of illumination, and in apparatus used when transmitting and measuring gas:" it then proceeded to allege the grant to them of letters-patent, dated the 7th of March, 1844, subject to the usual condition for the enrolment of a specification within six calendar months; and averred that such specification was duly enrolled on the 7th of September, 1844: Breach, that the defendant, well knowing the premises, but contriving, and wrongfully intending to injure the plaintiff, and to deprive him of the profits, benefits, and advantages which he *might and otherwise would have derived and acquired from the making, using, exercising, and vending of the said invention, after the making of the said letters-patent, and within the term of years in the said letters-patent mentioned, to wit, on the 11th of September, 1845, and on divers other days and times between that day and the commencement of the suit, and within that part of the United Kingdom of Great Britain and Ireland called England, unlawfully and unjustly, without the leave or licence, and against the will of the plaintiff and the said William

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Richards, or either of them, made and sold divers, to wit, one thousand apparatus to be used for transmitting and measuring gas, with certain improvements in the construction thereof, which said improvements were intended to, and did, imitate and resemble the said improvements in the said letters-patent so invented by the plaintiff and the said William Richards as aforesaid, in breach of the said apparatus, and against the privilege so granted to the plaintiff and the said William Richards and their assigns as aforesaid; whereby the plaintiff had been and was greatly injured, &c.

The defendant pleaded, amongst other pleas,—secondly, *non concessit*; fourthly, that the plaintiff and the said William Richards did not, nor did either of them, particularly describe and ascertain the nature of their said invention, and in what manner the same was to be performed, in manner and form as the plaintiff had above in that behalf alleged, concluding to the country; sixthly, that the invention in the said instrument in writing particularly described and ascertained, was not the invention for which the said letters-patent were granted, but another and a different invention; and that, by reason thereof, the said letters-patent, and the rights, liberties, privileges, benefits, monopolies, and advantages in and by the said letters-patent *granted, and the prohibitions therein contained, before and at the said several times when &c. were, and still remained, wholly void and of no effect, and the same were and continued wholly lost to the plaintiff; wherefore the defendant, at the said several times when &c. in the declaration mentioned, committed the said several grievances in the declaration mentioned, as he lawfully might for the cause aforesaid; verification; seventhly, that, before the making of the letters-patent, the plaintiff and Richards, by their petition in the said letters-patent mentioned, represented to the Crown that the said invention was of, amongst other things, improvements in the manufacture of gas for the purpose of illumination; whereas, the said representation was false, and the said invention was not an invention of any improvement in the manufacture of gas for the purpose of illumination; whereby the Crown had been deceived in the grant, &c., verification.

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The plaintiff by his replication traversed the sixth and seventh pleas, and joined issue upon the others.

The cause was tried before Wilde, Ch. J., at the sittings in London after Trinity Term, 1847. The letters-patent, which were put in, corresponded with the claim as disclosed in the declaration.

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But the specification, which was also put in by the plaintiff, recited the grant of a patent with a somewhat different title,—stating it to be for “improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used therein and when transmitting and measuring gas.” The invention was described as relating, “first, to a mode of manufacturing gas for the purpose of illumination; secondly, to improvements in setting and heating clay retorts for making coal-gas; thirdly, to a mode of manufacturing clay retorts; and fourthly, to improvements in apparatus for measuring gas when it is being transmitted to the *consumer.” Reference was then made to the drawings annexed to the specification, and the specification proceeded to describe the nature and the mode of performing each of those four heads of claim.

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On the part of the defendant, it was submitted that the specification showed an invention different from that for which the patent was granted, inasmuch as it claimed, in addition to the improvements in the manufacture and measuring of gas, the making of clay retorts.

For the plaintiff, it was insisted, that the substantial object of the specification was, improvements in the manufacture of gas, and in the apparatus for transmitting and measuring it; and that the making of clay retorts was only subservient to the manufacture of gas.

The learned Judge inclined to think the objection fatal; and a verdict was entered for the defendant on the fourth, sixth, and seventh issues, the jury being discharged from finding any verdict upon the other issues, and leave being reserved to the plaintiff to move to enter the verdict for him upon all or any of the issues so found for the defendant, with 40*s.* damages, if the Court should be of opinion that the specification produced sustained the patent. It was also agreed that the Lord Chief Justice should be considered as having given such direction as the Court upon the argument should think he ought to have given, and that the party against whom the decision might be given, should be considered as having tendered a bill of exceptions to such direction, in order to obtain the opinion of a court of error.

Channell, Serjt., in the following Michaelmas Term, obtained a rule nisi accordingly.

He submitted, first, that the specification, taken altogether, did not claim anything beyond what the letters-patent entitled *the

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patentees to; secondly, that, if it did claim something more, the matter so claimed was so entirely distinct from and independent of the real subject of the plaintiff's claim, that it might be rejected as surplusage, and did not vitiate the patent; thirdly, that the fourth, sixth, and seventh pleas were not properly framed to raise the objection.

Byles, Serjt., *Webster*, and *Duncan*, showed cause, in Hilary Term, 1849:

The title of the letters-patent involves two heads of claim, viz. "improvements in the manufacture of gas," and "improvements in apparatus used when transmitting and measuring gas." The invention recited in the specification is of something totally different: it is of "improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used therein and when transmitting and measuring gas," clearly involving a claim for improvements in the apparatus used in the manufacture of gas. It is clear that the objection is one which must prevail, if properly taken. The allegation of the inrolment of a specification is a material one: if the specification cannot be read, the plaintiff does not support his declaration: *Walton v. Potter* (1); *Muntz v. Foster* (2). There is no pretence for saying that the improved mode of making clay retorts, by hydraulic or other pressure, is an improvement in apparatus for "transmitting and measuring" gas: the claim is clearly referable only to apparatus to be used in the manufacture of gas: and, if so, it is a claim which is not within the patent. In *Rex v. Wheeler* (3), a patent had been granted for "a new or improved method of drying and preparing malt:" in the specification it was stated that *the invention consisted in exposing malt, previously made, to a very high degree of heat; but it did not describe any new machine invented for that purpose, nor the state, whether moist or dry, in which the malt was originally to be taken for the purpose of being subjected to the process, nor the utmost degree of heat which might be safely used, nor the length of time to be employed, nor the exact criterion by which it might be known when the process was accomplished: and it was held that the patent was void, first, because the specification was not sufficiently precise; {secondly,

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(1) 3 Man. & G. 411; 4 Scott, N. R. 471; 1 Dowl. & L. 737.
91.

(3) 20 R. R. 465 (2 B. & Ald. 345).

(2) 6 Man. & G. 734; 7 Scott, N. R.

because the patent appeared to be for a different thing from that mentioned in the specification.

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(MAULE, J. : Does every excess of claim vitiate a patent ?)

Yes, unless amended under the provisions of Lord Brougham's Act, 5 & 6 Will. IV. c. 83, s. 1. This defence is available under *non concessit*, which, as TINDAL, Ch. J., observes, in *Bedells v. Massey* (1), is the only way in which the defendant can raise the question whether that which the plaintiff claims is within the grant.

(MAULE, J. : Suppose there was no specification at all inrolled, could you show that under *non concessit* ?)

No. [They referred to *Bunnett v. Smith* (2) and *Hill v. Thompson* (3).]

At all events, the objection is sustainable under the sixth plea, which states that the invention specified is not that for which the patent was granted. There is no case in which it has been held that any part of the claim can be rejected as surplusage. Lord LYNCHURST, in *Sturz v. De la Rue* (4), says, that, "the description in the patent must unquestionably give some idea, and, so far as it goes, a true idea, of the alleged invention, though the specification may be brought in aid to explain it."

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Channell, Serjt., in support of the rule :

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In *Morgan v. Seaward* (5) PARKE, B., in delivering the judgment of the Court, says : "That a false suggestion of the grantee avoids an ordinary grant of lands or tenements from the Crown, is a maxim of the common law : and such a grant is void, not against the Crown merely, but in a suit against a third person : *Travell v. Carteret* (6); *Alcock v. Cooke* (7). It is on the same principle that a patent for two or more inventions, when one is not new, is void altogether, as was held in *Hill v. Thompson* (8) and *Brunton v. Hawkes* (9); for, although the statute invalidates a patent for want of novelty, and

(1) 7 Man. & G. 630; 8 Scott, N. R. 337; 2 Dowl. & L. 322.

(2) 13 M. & W. 552; 2 Dowl. & L. 380.

(3) 17 R. R. 156 (3 Mer. 622; 1 Webster's Patent Cases, 237).

(4) 29 R. R. 24 (5 Russ. 322, 324).

(5) 46 R. R. 700 (2 M. & W. 544;

1 Webster's Patent Cases, 187).

(6) 3 Lev. 134.

(7) 30 R. R. 625 (5 Bing. 340; 2 Moo. & P. 625).

(8) 20 R. R. 488 (8 Taunt. 375; 2 Moore, 424).

(9) 23 R. R. 382 (4 B. & Ald. 541).

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consequently, by force of the statute, the patent would be void, so far as related to that which was old, yet the principle on which the patent has been held to be void altogether, is, that the consideration for the grant is novelty of all, and, the consideration failing, the Crown being deceived in its grant, the patent is void, and no action maintainable upon it." In *Nickels v. Haslam* (1), letters-patent were obtained for improvements in the manufacture of a certain article: the specification described a single improvement in the mode of manufacturing that article: and it was held that this was not an inconsistency invalidating the patent. * * The question here is, what is the fair meaning of the first branch of the plaintiffs' claim. They were bound to show some sort of improvement in the mode of manufacturing gas for the purpose of illumination. They do not claim the making of retorts; but merely the use of clay retorts made upon the principle described in the specification, as ancillary to the improved manufacture of gas.

(MAULE, J.: Then they ought to have claimed the using, and not the making of them. The specification in effect describes the claim to consist of two things: first, the manufacture of gas, with improvements in setting and heating clay retorts; secondly, the making the retorts. Would the making of clay retorts in the mode described, for the purpose of being used in the manufacture of gas, be an infringement of this patent?)

It is submitted that it would not. The making of the retorts is not claimed, but merely the use of them as subservient to the improved manufacture of that which was the real subject-matter of the patent. The patentees were bound to describe the retorts in their specification, as a mode of producing the improved result: see *Clegg's Patent* (2).

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The next question is, whether the patent is defeated *by the introduction of the matter which comprises the third head of claim in the specification: and that depends upon whether or not there is any plea upon the record adapted to raise the objection. * * *

Cur. adv. vult.

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MAULE, J., now delivered the judgment of the Court:

This was a motion for a new trial, in an action upon the case

(1) 7 Man. & G. 378; 8 Scott, N. R. (2) 1 Webster's Patent Cases, 103.
97.

for an infringement of a patent, which was described in the declaration to be "for certain improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used when transmitting and measuring gas." There were several pleas: amongst others, was one,—the sixth,—which stated that the invention described in the specification was a different invention from that for which the letters-patent were granted, and that, by reason thereof, the letters-patent were void. There was likewise a plea of *non concessit*.

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At the trial before Wilde, Ch. J., a verdict was found for defendant on the fourth, sixth, and seventh issues, the jury being discharged as to the other issues; and a rule *nisi* was afterwards obtained, pursuant to leave reserved at the trial, to enter a verdict for the plaintiff on those issues with 40*s.* damages. Upon the argument of that rule, the question mainly turned upon the sufficiency of the specification, regard being had to the pleas I have mentioned.

It appeared that the letters-patent had been granted for the objects mentioned in the declaration. The patent was properly described in the declaration as a patent for "improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used when transmitting and measuring gas." No specification appeared to have been inrolled of any patent with that particular title; but a specification was inrolled, reciting the grant of a patent with a title somewhat *similar to that mentioned in the declaration, but with the additional words "therein and" interpolated between "used" and "when," so that the specification as inrolled was in its title or introductory part represented as being a specification of an invention "for improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used therein and when transmitting and measuring gas." The insertion is slight as to the number of words, but it adds most materially to the meaning of the sentence, and extends substantially the grant of the Crown; because the title, as suggested in the specification, represents the patent as being a patent for different kinds of apparatus used for two distinct things, viz. the making of gas, and the transmitting and measuring it. The making of gas is a chemical operation, which has now become familiar, and consists in evolving from coal, or other suitable material, ordinarily by means of heat, the gas which is contained therein or capable of being produced therefrom. The improvement of the apparatus

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used in that process, is described in the specification as one of the objects of the patent. The other object which is mentioned in the title of the specification is, the improvement of apparatus used in "transmitting and measuring gas." The transmission and measuring of gas, as is well known, are performed by sending it through pipes and through a certain instrument called a meter, on its way to the premises of the consumer. The two objects thus referred to are evidently perfectly distinct from and independent of each other,—the manufacture of gas being one thing, and the issuing it for consumption another.

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Now, the patent granted, was, a patent "for certain improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used,"—not, "when manufacturing gas," but "when transmitting *and measuring gas." The title did not profess to comprehend improvements in any apparatus used in making gas. The patentees in representing to the Crown the nature of the invention which they had discovered, did not give the Crown notice that they claimed the exclusive use of any apparatus for making gas. The title of the patent as described in the specification is one which comprehends as well improvements in apparatus for making gas, as improvements in apparatus used in its transmission and metage. And, when the body of the specification is looked at, one main part of the patentees' claim consists of what may be, and probably is, a new mode of manufacturing clay retorts,—an apparatus used in the manufacture, and not in the transmitting and measuring of gas. Any person reading the specification for the purpose of ascertaining what the patentees claimed as their exclusive right, would see without doubt that a material branch of their claim, and of the patent the specification of which they were professing to inrol, was, an improvement in apparatus used in the manufacture of gas. Now, no patent at all has been granted to them for that: and it appears to us to be difficult to suppose that the inrolling a specification in the terms here used can have been intended as otherwise than an attempt on the part of the grantees to remedy an oversight, and so to alter and enlarge the patent. It seems to us that they have specified for a more extensive and a different patent from that which was granted to them. We therefore think the specification insufficient: and that the objection properly arises on the sixth plea. Probably *non concessit*, or the fourth plea, which states that the plaintiff and Richards did not particularly describe the nature of their invention,

and in what manner the same was to be performed, *modo et formâ*, would equally raise *the defence, if the sixth plea were not enough for the purpose.

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Upon the whole we think that the direction of the LORD CHIEF JUSTICE was substantially correct, and that the defendant is entitled to have the verdict entered for him upon the fourth or the sixth issues, or on both, at his election; and consequently that the rule for entering the verdict for the plaintiff must be discharged. The *postea* will therefore be stayed until the first day of the next Term, to give the defendant an opportunity of making his election, and of applying to his Lordship to enter the verdict accordingly.

Rule discharged.

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1850.
Jan. 12.
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(9 C. B. 493—509; S. C. 19 L. J. C. P. 190; 14 Jur. 248.)

A., B., and C., by an agreement in writing, hired premises of D.: the premises so hired were intended to be, and were, used for the purposes of a Joint-Stock Company, of which A., B., and C. were at the time of the contract committee-men: rent was for some time paid by the Company, but ultimately became in arrear; whereupon D. sued A., B., and C. upon the agreement: B. and C. suffered judgment by default, and D. recovered the amount of rent and costs against A.:

Held, that A. was entitled to sue B. and C. for contribution; and that his remedy against B. was not affected by the circumstance of B.'s having ceased to be a member of the committee before the accruing of the rent in respect of which the action was brought.

THESE were actions of debt for money paid, money lent, and money found due upon an account stated. The defendant in each case pleaded *nunquam indebitatus*; upon which issue was joined.

Boulter v. Peplow was tried before Wilde, Ch. J., at the sittings in London after Trinity Term last. It appeared, that, by an agreement bearing date the 11th of April, 1846, Messrs. White and Gillett demised to Boulter, Peplow, and Brooke, who were described in *the agreement as three of the provisional committee of the Universal Gas-Light Company, certain premises situate at No. 11, Old Jewry Chambers, in the city of London, at the yearly rent of 80*l.*, which Boulter, Peplow, and Brooke thereby agreed to pay. The premises were taken possession of, on behalf of the proposed Company, on the 27th of April. The deed of settlement of the Company was registered on the 29th of September, in the same year. White and Gillett having brought an action against Boulter, Peplow, and

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Brooke, to recover arrears of rent from Christmas, 1846, to Lady Day, 1848, Peplow and Brooke suffered judgment to go by default, and a verdict having been obtained against Boulter, the amount of the damages and costs were levied upon him; and he brought these actions against Peplow and Brooke to recover contribution.

On the part of the defendants, it was objected that the actions were not maintainable, inasmuch as Boulter, Peplow, and Brooke were partners in the Company for whose use the premises were taken.

To this it was answered, that there was no partnership at the time this contract was entered into, the deed of settlement not having been registered, and no complete Company having been formed.

The LORD CHIEF JUSTICE overruled the objection, reserving leave to the defendant to move to enter a verdict for him, or a nonsuit.

On the part of the defendant, a copy of the registered deed of settlement, dated the 20th of September, 1846, was offered in evidence. It was produced by a clerk from the office of the Registrar-General of Joint-Stock Companies, but was not stamped. Indorsed upon it, pursuant to the 9 & 10 Vict. c. 110, s. 7, sched. (B.), was the following certificate:

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“ We do hereby certify that the within-written *deed is the deed of settlement of the Universal Gas-Light Company, and that, to the best of our knowledge, the particulars therein contained are correctly set forth.

(Signed) “ JOHN M. FIELD.
“ E. BOULTER.”

For the plaintiff, it was insisted that the copy was not admissible to prove either the execution or the contents of the deed, but that the original should have been produced, or a certified copy or extract, according to the 7 & 8 Vict. c. 110, s. 18 (1).

The learned Judge ruled that the copy was admissible, on the principle established by *Slatterie v. Pooley* (2).

It appeared that the deed had been executed by the plaintiff and by Peplow and Brooke; and, after reciting that there was due to the defendant Peplow, as one of the provisional committee, the sum of 574*l.* 4*s.* 6*d.*, for moneys advanced by him towards the formation of

(1) Repealed by 25 & 26 Vict. c. 89. Vict. c. 26, s. 6.—J. G. P.
See now s. 174 of that Act and 40 & 41 (2) 55 R. R. 760 (6 M. & W. 664).

the Company, for contingent expenses, rent of offices, &c., the deed contained the following, amongst other clauses: 1. That the Company should be named "The Universal Gas-Light Company." 4. That the business *of the Company should be conducted at No. 11, Old Jewry Chambers. 7. That the plaintiff and the defendants should be three of the directors. 82. That the directors should provide and maintain offices and other convenient rooms, as they should deem fit, for conducting the business of the Company. 152. That the several parties to the deed did thereby ratify and confirm all acts, deeds, matters, and things which, up to that date, had been done, executed, and performed by the then directors of the Company, or any of them, or by the order and direction of them or any of them in regard to the formation and business of the company, the funds and property thereof, or in any wise relating thereto.

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A verdict having been found for the plaintiff, damages 45*l.* 11*s.*,

Byles, Serjt., in Michaelmas Term last, pursuant to the leave reserved to him at the trial, obtained a rule *nisi* to enter a verdict for the defendant. He referred to *Sadler v. Nixon* (1), *Helme v. Smith* (2), and *Pearson v. Skelton* (3), and to *Collier on Partnership* (4).

Kinglake, Serjt., and *Pashley*, now showed cause.

The plaintiff and the two defendants, Peplow and Brooke, were clearly liable to White and Gillett. At *the time the contract in question was entered into, the Company had not been formed: it was not proved that there was any provisional committee: but these three persons, Boulter, Brooke, and Peplow, took upon themselves individually to hire the offices. They clearly had no authority to bind the rest of the committee, if any did exist: *Wyld v. Hopkins* (5); *Barker v. Stead* (6). There is nothing to prevent a co-contractor from bringing an action against those who may be associated with him in an undertaking of this sort. In *Lucas v. Beach* (7), the plaintiff entered into an express contract with a committee of individuals associated together for the purpose of obtaining an Act of Parliament for making a turnpike-road, to do certain work for a specified sum: he afterwards caused his name to be inserted in the list of subscribers, for two shares: and it was held that he was not thereby precluded from recovering upon such express contract. A mere preliminary

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(1) 5 B. & Ad. 936.

(4) 2nd ed. p. 188.

(2) 33 B. R. 630 (7 Bing. 709; 5 Moo. & P. 744).

(5) 71 B. R. 751 (15 M. & W. 517).

(6) 3 C. B. 946.

(3) 46 B. R. 380 (1 M. & W. 504).

(7) 56 B. R. 419 (1 Man. & G. 417).

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PEPLOW. arrangement will not constitute a partnership; as was held in *Fox v. Clifton* (1), *Fox v. Frith* (2), and many other cases. Reliance was placed, on the part of the defendant, at the trial, upon *Holmes v. Higgins* (3). There, a number of persons, including the plaintiff and the defendant, had associated themselves together for the purpose of obtaining a bill in Parliament to make a railway; the defendant acted as chairman; the plaintiff, who was the surveyor, brought an action, for work done by him as such, against the defendant; and it was held, that the action was not maintainable against the partnership, on the ground that the same person could not be both plaintiff and defendant in the same action.

(CRESSWELL, J.: The decision there is put upon the ground of liability to contribution.)

[[498] There, as in *Wilson v. Viscount Curzon* (4), there was no express contract between the plaintiff and the defendant, and no duty implied by law to indemnify the plaintiff. *Chadwick v. Clarke* (5), where *Holmes v. Higgins* was referred to, is an authority to show, that, under circumstances like those of the present case, an action will lie upon an express contract. *Edger v. Knapp* (6) is directly in point. There, four persons who had acted as directors of a proposed Railway Company, being sued for debts contracted on account of the concern, jointly retained an attorney to defend them, on their personal responsibility; and it was held, that one of the four, who had paid the attorney's bill, was entitled to sue the others for contribution.

(CRESSWELL, J.: Suppose the premises had originally been taken upon the credit of the Company; and, after a distress for rent, these three persons had jointly entered into an independent contract to pay the amount, and one of them had afterwards paid the whole,—could he not have sued the others for contribution?)

Clearly he might. Nothing that was afterwards done here could in any respect vary the nature of the contract of the 11th of April, 1846. [They referred to Story on Partnership, § 221, and Fitzherbert's *Natura Brevium*, p. 162, B. C.] One of several co-sureties in a bond may recover against any one of the others his

(1) 31 R. R. 536 (6 Bing. 776).

(2) 62 R. R. 546 (10 M. & W. 131).

(3) 1 B. & C. 74; 2 Dowl. & Ry.
196.

(4) 15 M. & W. 532.

(5) 1 C. B. 700.

(6) 63 R. R. 469 (5 Man. & G. 753;
6 Scott, N. R. 707).

aliquot proportion of the money paid by him under the bond, regard being had to the number of sureties: *Cowell v. Edwards* (1). Here, the defendant was by the plaintiff's payment relieved from a personal liability.

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(MAULE, J.: And the plaintiff paid the money under legal compulsion, which is equivalent to request.)

Hence, an implied assumpsit arose on the defendant's part to repay his proportion. Most of the authorities upon this subject will be found collected in *Davies v. Humphreys* (2), and commented on by PARKE, B., in delivering the judgment of the COURT. The law does not affect to do complete justice in these cases between the parties: where there are six sureties, three of whom turn out to be insolvent, and one of the three solvent parties pays the whole, it would seem to be but reasonable that the contribution of the other two should be in thirds; but the rule of law is otherwise, and holds each liable only to reimburse his co-surety to the extent of one sixth: *Browne v. Lee* (3); *Kemp v. Finden* (4). Even in the case of a partnership, assumpsit will lie for the balance of an adjusted account: *Foster v. Allanson* (5); *Moravia v. Levy* (6).

The certified copy of the deed of settlement was improperly received in evidence: it was not admissible to prove either the execution, or the contents, of the deed. The doctrine of *Slatterie v. Pooley* (7), which was supposed to justify its reception, is this, that an admission by a party, may be proof of a fact, but not that it admits the contents of a deed.

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(MAULE, J.: What the party says, about the contents of a deed, is primary and original evidence.)

The case of *Slatterie v. Pooley* is not to be extended.

(MAULE, J.: It certainly is not very satisfactory in its reasons. The decision was founded upon a passage in Phillips on Evidence (8), which in itself does not seem to me to be very sound. What the party himself says, is not before the jury, but only the witness's representation of what he said. What a man says, is, generally,

(1) 2 Bos. & P. 268.

(2) 55 R. R. 547 (6 M. & W. 153).

(3) 6 B. & C. 689; 9 Dowl. & Ry.
700.

(4) 67 R. R. 384 (12 M. & W. 421).

(5) 2 T. R. 479.

(6) 2 T. R. 483 (a).

(7) 55 R. R. 760 (6 M. & W. 664).

(8) 8th ed. Vol. I. p. 364.

ROULTER and very properly, evidence against him : but a verbal representa-
PEPLOW. tion by a third person is quite another thing (1).)

The doctrine of *Slatterie v. Pooley* was under discussion in this Court in *Bringloe v. Goodson* (2) and *Howard v. Smith* (3), in the latter of which it is somewhat narrowed. The deed is only before the Court with reference to the admission that it is the deed referred to.

(MAULE, J. : I rather think the rule laid down in *Slatterie v. Pooley* has been extended to all the words of the instrument.)

[*502] The rule, at all events, does not apply, where there is an attesting-witness : *Bailey v. Bidwell* (4) ; **Streeter v. Bartlett* (5). In the latter case, it was held, that, in order to prove an admission of a debt, by the medium of an entry in a schedule filed by the defendant in the Insolvent Debtors Court, it is necessary to prove the defendant's signature, by calling the subscribing-witness, even where the document has been acted upon by the Court.

(MAULE, J. : You might as well attempt to dispense with the attesting-witness, by proving that the party had sealed and delivered the deed,—the very thing the attesting-witness is required for.)

The Act requires the deed to be inrolled by two of the directors : is the whole body to be bound by the admission of the two who deposit the deed ? In *Molton v. Harris* (6), it was held that the memorial of a conveyance that has been registered, is not evidence of the contents of such conveyance, unless notice has been given to the opposite party to produce the conveyance.

(MAULE, J. : That case was decided about half a century before *Slatterie v. Pooley*.)

In *Doe d. Loscombe v. Clifford* (7), it was held, that an examined copy of a memorial of a purchase-deed, registered in Middlesex, under the statute 7 Ann. c. 20, is only receivable as secondary evidence

(1) According to *Slatterie v. Pooley*, what A. states as to what B., a party, has said respecting the contents of a document which B. has seen, is admissible, whilst what A. states respecting a document which he himself has seen, is not admissible, although, in the latter case, the chance of error is

single, in the former, double.

(2) 44 R. R. 332 (5 Bing. N. C. 738).

(3) 60 R. R. 506 (3 Man. & G. 254).

(4) 67 R. R. 517 (13 M. & W. 73).

(5) 5 C. B. 562.

(6) 2 Esp. N. P. C. 549.

(7) 80 R. R. 846 (2 Car. & Kir. 448).

of the deed, against the parties to the deed, and all persons claiming under them; and that the fact that A. mortgaged the property to B., and delivered this deed to B. as mortgagee, is not sufficient to make it secondary evidence against A. That was a decision by one of the Judges who were parties to *Slatterie v. Pooley*.

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(MAULE, J.: I cannot help thinking that "secondary" is a mistake there.)

In *Wollaston v. Hakewill* (1), the registered memorial of a deed conveying lands in Middlesex, was held to be secondary evidence of the contents of such deed, against the personal representatives of the party by whom such deed is registered. The case of **The Fishmongers' Company v. Robertson* (2) is also an authority in favour of the plaintiff, so far as regards the opinion of TINDAL, Ch. J., which is unaffected by the subsequent decision of the court of error (3).

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(MAULE, J.: In that case it was sought to prove an admission by a defendant, that a certain paper was the original agreement: and it was objected that that could not be done without calling the attesting-witness. That can have nothing to do with this case.)

The Court of Queen's Bench in Ireland, in a recent case of *Lawless v. Queale* (4), express very strong disapprobation of the doctrine of *Slatterie v. Pooley*. * * And see the remarks of CRAMPTON, J., upon the cases of *Newhall v. Holt*, *Slatterie v. Pooley*, and *Howard v. Smith*.

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(WILLIAMS, J.: It is impossible for us to overrule *Slatterie v. Pooley*, though we may think the reasoning not quite satisfactory.)

Byles, Serjt., and *Bernard*, in support of the rule:

The agreement under which Boulter, Brooke, and Peplow hired the premises in question, was made by them on behalf of the Company; the premises were used for the purposes of the Company; and the rent which was paid, was paid by cheques upon their *bankers. The Company, having thus recognised and confirmed the agreement, were bound by it: *Lord Petre v. The Eastern Counties Railway Company* (5); *Gleadow v. The Hull Glass Company* (6). White and Gillett might have sued the Company.

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(1) 60 R. R. 517 (3 Man. & G. 297;
3 Scott, N. R. 593).

(4) 8 Irish Law Reports, 382.

(5) 1 Rail. Cas. 462.

(2) 1 C. B. 60.

(6) 19 L. J. Ch. 44.

(3) 77 R. R. 526 (6 C. B. 896).

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(MAULE, J.: Not upon the agreement.)

For use and occupation; and, judgment having been recovered against the Company, execution might have been obtained against any of the shareholders. But one member could have had no remedy against another who had paid more than himself on account of the Company. The case clearly falls within the authority of *Holmes v. Higgins* (1). It was there held that an action was maintainable by an agent employed in endeavouring to pass a bill through Parliament for making a railway, against the chairman of the committee, where the agent was himself a subscriber. In *Sadler v. Nixon* (2), where A. recovered against B., C., and D., partners in trade, upon their joint contract, and took in execution B. only, who thereupon paid the whole sum recovered, it was held, that B. could not recover in a court of law against his co-defendants, for contribution. In *Borill v. Hammond* (3), where two persons jointly undertook to procure a cargo for a vessel, for certain commission which they agreed to divide equally between themselves, and one of them received on account of such commission a certain sum of money, it was held that the other could not maintain money had and received for a moiety, the demand arising out of a partnership transaction, and no account having been settled between them. So, in *Milburn v. Codd* (4), a Joint-Stock Company, in which A., B., and *C. were shareholders, was dissolved: A. and B., being sued by a creditor of the concern, employed C., who was an attorney, to defend them: and it was held, that C. could not sue A. and B. for his bill of costs. Lord TENTERDEN there said: "The actions which the plaintiff defended, were actions brought against the defendants as members of a partnership of which the plaintiff was also a member. When an action was commenced, it was the duty of all the partners in the late Company, either to pay the money, or to resist the demand; and, in case of resistance, the expense ought to be paid by all,—the plaintiff among the rest."

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The certified copy of the registered deed was properly received in evidence.

(MAULE, J.: We all think so too.)

(1) 1 B. & C. 74; 2 Dowl. & Ry. 196.

(3) 6 B. & C. 149; 9 Dowl. & Ry. 186.

(2) 5 B. & Ad. 936; *S. C.* (nom. *Sadler v. Hickson*) 3 Nev. & M. 258,

(4) 7 B. & C. 419; 1 Man. & Ry. 238.

Charnock, who appeared for Brooke, submitted that he, at all events, was not liable in respect of rent accruing after he had resigned his office of committee-man, and his resignation had been accepted by his co-directors.

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(MAULE, J.: White and Gillett might have sued Brooke for the whole rent, and he might have sued Boulter and Peplow for contribution. If he would be entitled to contribution, it could only be by virtue of the mutual contract.)

MAULE, J.:

Two questions have been argued in this case. The COURT has already intimated an opinion that the copy of the deed was properly received, upon the authority of the *dictum* in *Slatterie v. Pooley* (1), which has frequently been recognised and acted upon. That being so, the only remaining question, is, whether the plaintiff is entitled to recover contribution against the defendants in these two actions. It appears that *the plaintiff, Peplow, and Brooke, were three of several persons who were associated together for the purpose of establishing a Gas Company; that the three applied to White and Gillett, the landlords of premises in the Old Jewry, to let the same to them; that White and Gillett accordingly demised the premises to them, and to them only, by a written agreement; that, rent being in arrear, the plaintiff, Peplow, and Brooke were sued in a joint action; that Peplow and Brooke suffered judgment by default; and that White and Gillett recovered a certain sum in that action, the whole of which, together with the costs, was paid by the plaintiff. *Primâ facie*, where one of three joint-contractors who are jointly sued, pays the whole debt, he is entitled to receive contribution from the other two. That state of circumstances exists here: and the only question is, whether there existed any other facts which afford an answer to the plaintiff's right to such contribution. It does not appear to me that any such answer has been given. It is suggested that there was a partnership, or a *quasi* partnership, between the plaintiff, Peplow, and Brooke, and others, and that, consequently, the plaintiff might be entitled to have an account taken in a court of equity, but not to contribution at law. But I think, supposing such partnership did exist, it by no means follows that the plaintiff would not be entitled to recover in this action. The three entered

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into a joint contract with White and Gillett, who probably would not have dealt with a larger number. Those three, therefore, alone incurred a joint liability to pay the rent; and they would be subject to contribution amongst themselves. Although it may be, that, when each of the three has paid his share of the rent in respect of that joint liability, each may be entitled to charge such share in the partnership account, it by no means follows that the right of contribution *inter se* does not *likewise exist. Each was liable *in solido* to the original demand: and from that arises an implied contract that the one who pays the whole shall be reimbursed, in their respective proportions, by the other two. There is nothing that I can discover here, to show that these parties did not intend that the ordinary implication should arise in this case. On the contrary, I think there is every reason to infer that they intended to incur the ordinary liabilities incident to such a contract as they had entered into; and that inference is not rebutted by the circumstance that the money they are called upon to pay under that contract, may be chargeable by them against the Company for whose benefit they assumed the liability. Upon the simple ground, therefore, of the inference arising from the position of the parties, and of that inference not being rebutted by any of the facts found in this case, it seems to me that the plaintiff is entitled to retain his verdict. The cases cited have most of them very little to do with the matter: and none of them goes to show, that, under circumstances like these, an action is not maintainable. I therefore think this rule must be discharged.

WILLIAMS, J. :

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I am of the same opinion. The circumstances are shortly these: The plaintiff, Peplow, and Brooke entered into a contract with third persons, whereby they made themselves jointly liable for rent of certain premises. The premises so hired were intended to be used as the place of business of a Joint-Stock Company, of which those three persons were members. Whatever remedy they might have as against the other members of the Company, when these persons placed themselves under this liability to the landlords of the premises, they likewise came under an implied liability *inter se*, that, if one should be called upon to pay, and should actually pay, the whole rent, the other two *would reimburse him to the extent of their respective shares. And this

implied contract is not in any degree affected by the rule of law, that one partner cannot sue his co-partners in respect of a partnership debt.

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TALFOURD, J. :

I am of the same opinion. The contract out of which this cause of action arises, is entirely collateral to the partnership: and the defendants are liable to contribution irrespectively of the state of accounts amongst the partners.

Rule discharged.

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SAME v. SAME.

(9 C. B. 509—535.)

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A., the farming bailiff of Lord D. (after his employment as such had ceased), received a cheque for 180*l.* in payment for wheat belonging to Lord D., which he had sold on his account while acting as bailiff, and paid it in to his own account with B. & Co., his bankers, who received the cash for it, and gave A. credit for the amount, but afterwards, under an indemnity from Lord D., refused to honour his drafts: Held, that, even assuming that the cheque had been improperly obtained by A., still, as between him and his bankers, the amount was recoverable by A., as money had and received by them to his use, or money paid.

THE first of these cases was an action of debt brought against the defendant, as public officer of the London and County Joint-Stock Banking Company, for money lent by the plaintiff to the Company, money received by them for the use of the plaintiff, and money found to be due to the plaintiff on an account stated with them.

The defendant pleaded that the Company were never indebted; and also a special plea, which the plaintiff traversed by his replication.

The second of the above actions was an action on the *case against the defendant as public officer of the same Banking Company, for dishonouring two cheques of the plaintiff, when he had a balance in their hands, and for exposing his account to a third person.

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[The declaration contained two counts, the substance of which is set out below, at p. 413.]

The defendant pleaded: first, that the said Banking Company were Not guilty; secondly (and sixthly), that the plaintiff did not retain and employ the Company as bankers; thirdly (and fourthly), that the Company had not any cash balance of the plaintiff in

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their hands sufficient to pay the cheques; fifthly (and seventhly), that, before and at the time when the plaintiff retained the said Banking Company as in the declaration mentioned, the plaintiff was the farm-bailiff and agent of Baron De L'Isle and Dudley, and that the plaintiff retained and employed the said Banking Company, as in the declaration mentioned, as such bailiff and agent as aforesaid, at the request and by the direction of the said Baron, but in his own name, and without disclosing to the said Company that the said Baron was his principal, and that he the plaintiff retained and employed the said Banking Company as the agent of the said Baron, and not on his own account: that the said cash balances which were so in the hands of the said Banking Company as in the declaration mentioned, at the several times when the said drafts or orders were so respectively presented for payment, and so refused payment, as in the declaration mentioned, were respectively cash balances composed of moneys belonging to the said Baron, *and which the plaintiff had, as such agent and bailiff as aforesaid, before the accruing of any of the causes of action in the introductory part of the plea mentioned, to wit, on the 20th of January, 1847, paid to and deposited with the said Banking Company, in his own name, and without disclosing to the said Company that the said Baron was his principal, or that the said moneys were the proper moneys of the said Baron: that the said cash balances were the proper moneys of the said Baron, and that the plaintiff, at any time, had not any lien upon the said cash balances as against the said Baron, nor any right to have the said cash balances, or any part thereof, paid to him, the plaintiff, by the said Banking Company, except as such agent of the said Baron as aforesaid, and by the permission of the said Baron: that, after the plaintiff had so retained and employed the said Banking Company as aforesaid, and whilst the said cash balances were so in the hands of the said Banking Company as aforesaid, and before the said drafts or orders, or either of them, were so drawn, or were so presented for payment, as in the declaration mentioned, to wit, on the 22nd of January, 1847, the said Baron gave notice to the said Banking Company of all the premises in this plea mentioned, and then directed and required the said Banking Company to retain in their hands the said cash balances for the use of him the said Baron, and not to pay or deliver the same, or any part thereof, to the plaintiff or his order; to which said request of the said Baron, the said Banking Company then

assented,—of all which premises in this plea aforesaid, the plaintiff afterwards, and before he drew the said drafts or orders in the declaration mentioned, or either of them, had notice: and that therefore the said Banking Company, at the several times when &c. in the declaration mentioned, did refuse to pay the said *drafts or orders, and did dishonour the same, as they lawfully might for the cause aforesaid, which were the same grievances as in the declaration mentioned. Verification.

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The plaintiff joined issue on the first, second, third, fourth, and sixth pleas; and replied to the fifth, that he, the plaintiff, did not retain or employ the said Banking Company as in the declaration first mentioned as such bailiff and agent, or as such bailiff or agent as in the said fifth plea mentioned, nor were the said cash balances which were so in the hands of the Company as in the declaration and fifth plea mentioned, or either of them, composed of moneys belonging to the said Baron, or which the plaintiff, as such agent and bailiff, or as such agent or bailiff, as aforesaid, paid to or deposited with the said Banking Company, in manner and form as the defendant had in his said fifth plea above alleged, concluding to the country: and to the seventh plea he replied *de injuriâ*.

The defendant joined issue on the replications to the fifth and seventh pleas.

The above causes were tried at Guildhall before Wilde, Ch. J., and by special juries, at the sittings after Hilary Term, 1848, when a verdict was found for the plaintiff in the first action, for 128*l.* 1*s.* 10*d.*, and in the second action for 40*s.* damages, subject to the opinion of the Court, in both actions, upon the following case:

The plaintiff, William Tassell, at the times in question, resided at Penshurst, in Kent, and kept a banking account with the London and County Joint-Stock Banking Company, a partnership of more than six persons, who carried on business as bankers in London and Tunbridge and other places, under the provisions of the statutes 7 Geo. IV. c. 46, and 7 & 8 Vict. s. 113: and he brought the first of those actions to recover 128*l.* 1*s.* 10*d.*, being the balance in his favour on the said banking *account; and the second action, to recover damages by reason of the Company's having dishonoured two of his cheques—one for 8*l.* 15*s.*, and another for 27*l.* 8*s.* 8*d.*, hereinafter mentioned, and also for having exposed the particulars of his account to Lord De L'Isle.

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In the years 1843 and 1844, the plaintiff, who is a practical farmer, and one Palmer, were tenants of a large farm, upwards of seven hundred acres, at Penshurst, in Kent, belonging to Lord De L'Isle and Dudley; and during this tenancy the plaintiff opened a banking account, in his own name, with the London and County Joint-Stock Banking Company, at their branch Bank at Tunbridge, in the county of Kent: which account continued, from that time down to the occurrences which gave rise to these actions, and was carried on in the usual manner between bankers and their customers.

In 1844, the plaintiff and Palmer ceased to be tenants of the said farm; and the plaintiff then entered into the service of Lord De L'Isle as his farming-bailiff, and continued in that employment down to the time of his discharge hereinafter mentioned. In the course of that employment, the plaintiff had the management of the farm as such bailiff, and the sale of the produce of it; and from time to time received large sums of money arising from the sale of the crops and other produce thereof, on account of Lord De L'Isle, and paid the various charges, expenses, and outgoings of the farm, as such farming-bailiff. During the continuance of the said banking account, the plaintiff was in the habit of paying in to the credit of his said account at the Tunbridge Bank of the said Banking Company, many of the sums of money received by him on account of Lord De L'Isle as aforesaid, as also other sums of money belonging to himself and others; and he also, from
[*520] time to time, during the continuance of the said banking account, made payments on account of the said Lord De L'Isle and other parties, and also on his own private account, by cheques drawn on the said Banking Company, upon the balance standing to his credit in the said account. The Company occasionally discounted bills for the plaintiff, and placed the money thence arising to his credit in the said account, and sometimes allowed him to overdraw his said account. The whole of the cheques drawn by the plaintiff against the said account, and paid by the Company out of it, were signed by the plaintiff in his own name only; and the account, as well as the usual pass-book, was kept by the Company under the plaintiff's name only. Until the Company received the notice from Lord De L'Isle hereinafter mentioned, they were not aware that his Lordship had any concern with the plaintiff's account with them, or that the plaintiff was his farming-bailiff.

At the trial, the pass-book containing the said banking account,

as entered and made up by the Banking Company, was put in, and proved to have been delivered to the plaintiff on the 20th of February, 1847. The items on both sides of the account, down to the end of the year 1846, are very numerous, and are not thought to be material to be set out: but the following is a copy of the entries in the pass-book from January 1, 1847, to the end of the account, showing the receipts by the Company from the plaintiff, and payments made by them on his cheques during the said month of January, with the respective dates of such receipts and payments:

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Receipts.				£	s.	d.
1847. Jan.	1.	Balance	.	167	14	11
„	20.	Cash	.	180	4	8
				<hr/>		
				£347	19	7

Payments.						
1847. Jan.	2.	Self	.	125	0	0
„	5.	Bates	.	5	0	6
„	„	Chapman	.	5	2	7
„	„	Collins	.	4	3	1
„	8.	Self	.	10	0	0
„	22.	Whisson	.	11	18	0
„	„	Self	.	30	0	0
„	23.	Wood	.	6	15	7
„	26.	Constable	.	8	15	6
„	„	Humphrey	.	13	7	6
				<hr/>		
				£219	17	9

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The balance of the account shown by the said pass-book in favour of the plaintiff on the 1st of January, 1847, was, 167*l.* 14*s.* 11*d.*, being the sum remaining after deducting the payments made by the Company in 1846 from their receipts of the plaintiff during the same year. As well the receipts as the payments of 1846 consisted of sums of money paid in and drawn out on his own account and on account of the other parties.

The only sum paid in by the plaintiff to his credit after the above date, was, a cheque drawn by Vines and Tomlin on Barclay & Co., for 180*l.* 4*s.* 8*d.*, dated the 19th of January, 1847, which was paid in by the plaintiff on the same date to the said Tunbridge

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[*522] It will be seen by the pass-book, that there were ten *of the plaintiff's cheques paid by the Company between the 1st and the 27th of January.

On the 19th of January, 1847, the balance appearing due to the plaintiff in his said banking account, was 18*l.* 8*s.* 9*d.* On the 20th of January, he was credited with 180*l.* 4*s.* 8*d.*, the proceeds of Vines and Tomlin's cheque, thereby making a balance in his favour of 198*l.* 13*s.* 5*d.*: but, on the 22nd, he drew out by two cheques, 41*l.* 13*s.*, and, on subsequent days, the further amount of 28*l.* 18*s.* 7*d.*, and thereby reduced the balance due to him to 128*l.* 1*s.* 10*d.*, which still remains unpaid to him, and is the amount claimed in the action of debt, the banking account having remained in the same state down to the present time.

On the 27th of January, 1847, the plaintiff drew a cheque on the said Banking Company, in the usual form, for 27*l.* 8*s.* 8*d.*, in favour of the Rev. R. Billing, or bearer, and which cheque he delivered on the same day to the Rev. R. Billing in payment of a debt of that amount due from the plaintiff to him. The Rev. R. Billing, through his banker's clerk, F. J. Headland, duly presented this cheque for payment, on the 29th of January, to the said branch Bank at Tunbridge, where the plaintiff's account was kept; and the said Company refused to pay the same, but referred the bearer of the cheque to the plaintiff.

On the 30th of January, 1847, the plaintiff also drew a cheque on the said Company, in the usual form, for 8*l.* 15*s.*, payable to self, or bearer, and caused the same to be duly presented by his agent. Thomas Poole, for payment, on the same day, to the said branch Bank: but the said Company refused to pay the same, and referred the bearer thereof to the plaintiff.

The dishonour of these two cheques arose out of the following circumstances: After Michaelmas, 1846, Lord De L'Isle became dissatisfied with the state of the accounts between himself and the plaintiff as his farm-bailiff, and, on the 11th of January, 1847, his Lordship, *through Mr. Glendinning, told the plaintiff he was not

from that time to deal any more with Lord De L'Isle's property, but to confine his services to giving orders to the men, and to seeing that they did their work on the farm.

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Some time between this date and the 28th of January, Lord De L'Isle, having learnt that the plaintiff had an account with the said Banking Company, went with Mr. Glendinning to the said Tunbridge branch Bank, and applied to the Company's manager there for leave to inspect the plaintiff's banking account which the Company kept in their books there according to the usage of bankers. This the manager refused, unless he had instructions to do so from the principal office of the Bank in London. Lord De L'Isle, having applied to that office, obtained such instructions, and again, in company with Mr. Glendinning, applied to the Tunbridge branch bank on the 28th of January; and they were then allowed by the manager there to inspect the plaintiff's account, of which he furnished them with a copy. Upon inspecting this account, Lord De L'Isle served the Bank with a notice, signed by him, of which the following is a copy:

"To the London and County Joint-Stock Banking Company.

"28th January, 1847.

"Please to hold in your hands, until further correspondence, the balance of 128*l.* 1*s.* 10*d.* on credit of the account of Mr. Tassell, the same being formed of money belonging to me; and I engage to hold you harmless for so doing.

(Signed) "DE L'ISLE."

It was in consequence of this notice that the Company dishonoured the plaintiff's cheques, as above mentioned.

After inspecting the account, Mr. Glendinning, on the same day, by authority of Lord De L'Isle, went to the plaintiff, and told him he had been receiving money for Lord De L'Isle's wheat; to which the plaintiff replied that he had. Mr. Glendinning then said—"How dare you do it, after my orders? Did I not tell you that you were not to deal with Lord De L'Isle's property, when I gave you orders some time ago?" The plaintiff replied, "You did: but you did not tell me not to receive money; and I had a right to receive it." To this Mr. Glendinning rejoined, "If you don't consider money property, I don't know what is." Glendinning then demanded the plaintiff's books, which he refused to give up: and he also refused to give a cheque for the balance of his said banking account, which Glendinning demanded. The latter then,

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by Lord De L'Isle's authority, discharged the plaintiff from his Lordship's service, and put a person in possession of the farm.

On a subsequent investigation of the accounts rendered by the plaintiff to Lord De L'Isle, of the plaintiff's receipts and disbursements as farming-bailiff to his Lordship, it appeared, that, on the 29th of September, 1846, there was a balance of 446*l.* 19*s.* 4*d.* in favour of his Lordship; and, by a supplemental account rendered in March, 1847, it appeared, that, on the 22nd of January, 1847, that balance had increased to 517*l.* 2*s.* 2*d.* in his Lordship's favour.

The said balance of 517*l.* 2*s.* 2*d.* also included the said cheque received of Vines and Tomlin. But, in these accounts, the plaintiff had not taken credit for the salary which was due to him from Lord De L'Isle, for his services, from Michaelmas, 1844, and which, according to the defendant's evidence, amounted to at least 180*l.*, at the end of 1846.

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On the 20th of February, 1847, the plaintiff served the Banking Company with a notice in writing, signed *by him, demanding payment of the said balance of 128*l.* 1*s.* 10*d.*, and giving them notice that interest would be claimed from the date of such demand until the time of payment.

On the 22nd of February, 1847, these actions were brought.

It is agreed that the Court shall be at liberty, if they shall think fit, to draw such inferences from the above facts, as a jury would have been justified in doing, or to send back the case to be amended or re-stated.

The question for the opinion of the Court is, whether, upon the above facts and pleadings, the plaintiff or the defendant is entitled to the verdict on the issues joined in these actions, or either of them.

If the Court shall be opinion that the plaintiff is entitled to the verdict in the first action, then the verdict is to be entered for the plaintiff, for 128*l.* 1*s.* 10*d.*, debt, and damages equal to the interest on that sum at 5*l.* per cent. per annum, from the 20th of February, 1847, till judgment: but, if the Court shall be of opinion that the defendant is entitled to a verdict in that action, then it is to be entered for him accordingly.

If the Court shall be of opinion that the plaintiff is entitled to the verdict in the second action, on either count or breach, then the verdict is to be entered for the plaintiff, damages 40*s.*: but, if the Court shall be of a contrary opinion, then the verdict is to be entered for the defendant.

J. Brown, for the plaintiff:

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This is an action by a customer against his bankers, to recover the balance of a banking account. It is admitted, upon the face of the case, that there is a balance; but the answer attempted to be set up, is, that that balance consists of the proceeds of a cheque which was the property of Lord De L'Isle, and was paid into the Bank by *the plaintiff as the agent of Lord De L'Isle, or was tortiously obtained by the plaintiff, and that therefore the bankers were justified in withholding it from him, under a notice from Lord De L'Isle. On the part of the plaintiff, it will be submitted, that the balance which is now claimed is not composed wholly of Lord De L'Isle's cheque; that the cheque was not paid in as agent and on account of Lord De L'Isle, but on the plaintiff's own private account; that the defendants could not themselves set up the *jus tertii*, nor, by improperly disclosing the state of the plaintiff's account to a stranger, enable such stranger to interpose; and that the money in question was money lent by the plaintiff to the Banking Company.

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The facts stated on the face of the case show clearly that the balance in question did not consist wholly of money belonging to Lord De L'Isle. At the time the cheque for 180*l.* 4*s.* 8*d.* was paid in, the balance in the plaintiff's favour was 18*l.* 8*s.* 9*d.* On that cheque being cashed, therefore, the defendants were indebted to the plaintiff in the sum of 198*l.* 13*s.* 5*d.* The cheques subsequently drawn were not paid out of one part of that balance more than out of another.

(MAULE, J.: The 18*l.* 8*s.* 9*d.* stands first in order of date.

CRESSWELL, J.: It is now settled, that money paid in by a customer to his banker, is money lent to the latter: *Pott v. Clegg* (1). Money paid out to the customer pays off the earlier debt; if this were not so, the earlier debt might be barred by the Statute of Limitations.)

In *Mills v. Fowkes* (2), TINDAL, Ch. J., says: "In *Peters v. Anderson* (3), where a debt was due from the defendant to the plaintiff on a covenant, and a debt on simple contract, and the defendant delivered goods in payment, *without appropriating them to either debt in particular, it was held that the plaintiff might appropriate

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(1) 73 B. R. 517 (16 M. & W. 321). 462).

(2) 50 B. R. 750 (5 Bing. N. C. 455, (3) 5 Taunt. 596; 1 Marsh. 238.

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them to the debt for which he had the worse security. In *Bosanquet v. Wray* (1), it was held that a creditor receiving money without any specific appropriation by the debtor, might be permitted, in a court of law, to ascribe it to the discharge of a prior and purely equitable debt, and sue him at law for a subsequent legal debt. These cases show clearly that the receiver has a right to appropriate, if the payer omit to do so; and *Simson v. Ingham* (2) shows that he may make the appropriation at any time before action." It will be said that the contract under which the defendants received the money in question, was a contract made by them with the plaintiff as agent of an undisclosed principal. The facts, however, show that this was the plaintiff's private banking account, quite independent of Lord De L'Isle, and opened before the plaintiff became Lord De L'Isle's agent. Lord De L'Isle could not have drawn cheques upon this fund, mixed up as it was with the plaintiff's own moneys. *Sims v. Bond* (3) is precisely in point.

[529] * * The same position is laid down by the Court of Exchequer, in *Cooke v. Seeley* (4).

* * * * *

[530] *Couch*, for the defendants :

The cheque in question was paid in to the bankers' by the plaintiff, as agent for, and to be cashed for the use of, Lord De L'Isle.

(CRESSWELL, J. : And the cash to be held at the disposal of Lord De L'Isle ?)

As agent for an undisclosed principal, who, when he disclosed himself, would have a right to draw the money out.

(MAULE, J. : Then, you will contend that the plaintiff was guilty of a breach of duty to Lord De L'Isle in not opening a separate account in his name ?)

There would be no breach of duty, if the plaintiff only drew upon this particular cheque for Lord De L'Isle's purposes.

(MAULE, J. : We all think there was a total absence of original contract between Lord De L'Isle and the Banking Company, which

(1) 16 R. R. 677 (6 Taunt. 597 ; 2 Dowl. & Ry. 249).
Marsh. 319).

(3) 39 R. R. 511 (5 B. & Ad. 389).

(2) 26 R. R. 273 (2 B. & C. 65 ; 3

(4) 76 R. R. 759 (2 Ex. 746).

there would be if your argument were tenable. You must, if you can, show some circumstances *aliunde* to excuse the non-payment *of the cheques.)

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The authority of the plaintiff to receive money on Lord De L'Isle's account ceased on the 11th January, 1847, when he was informed that he was no longer to deal with his Lordship's property, but to confine his services to the performance of the ordinary duties of a farming-bailiff. After his authority was so determined, he improperly received this cheque from Vines and Tomlin.

(MAULE, J.: Were not Vines and Tomlin justified in treating the plaintiff as a person authorised to receive the money? Does Lord De L'Isle adopt it as a payment?)

He is not bound to do so.

(MAULE, J.: Does he?)

No.

(MAULE, J.: Then, how can the cheque, or its proceeds, be his?)

Having got possession of it by means of an imposition, for the Court may infer that he obtained it by a tacit assertion that his agency continued, the plaintiff could acquire no title to the cheque: *Madden v. Kempster* (1); *Hardman v. Willcock* (2).

There was no necessity to plead the fraud; for, if the cheque was obtained by fraud, Lord De D'Isle had a right to interpose and say that the proceeds were money had and received by the Banking Company to his use.

(MAULE, J.: Suppose Lord De L'Isle had not interposed, but the other facts could be established,—could the Company have set up this defence?)

Until some claim was made, they could not.

(MAULE, J.: Does their right arise upon notice from Lord De L'Isle?)

Yes.

(1) 1 Camp. 12.

(2) 35 R. R. 566 (9 Bing. 382 (n)).

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(MAULE, J.: Then, up to the time of notice, the plaintiff would have a good right of action?)

The notice would relate back.

(MAULE, J.: Suppose Lord De L'Isle had interposed during the trial,—would you say that his claim would afford the bankers any defence upon *non assumpsit* or *nil debet*?)

[*532] A fact occurring since the commencement of the action could not be *used as a defence.

(MAULE, J.: It might, if it had the retrospect you mention. According to the maxim *Omnis ratihabitio retrò trahitur, et mandato æquiparatur*, the *ratihabitio* must be prior to the fact done which is the subject of the *mandatum*. The right of Lord De L'Isle at all events could not exist until notice.)

The right would exist, but the bankers would not be bound until notice.

(MAULE, J.: The transaction clearly would be valid, until Lord De L'Isle elected to claim the proceeds. The question is, what is the effect of his notice.)

It is submitted, that, under the circumstances, the proceeds of this cheque never was money had and received to the use of the plaintiff, but money had and received to the use of the person to whom it rightfully belonged.

(MAULE, J.: The nature of the contract is evidenced by the account; and the form of that, the mixture of items, negatives its being an agency account.)

The second count in the second action (1) is clearly bad: the facts do not raise the duty alleged.

(MAULE, J.: The probability is, that the second count is not sustainable: but, if we think either count good, and sustained by the evidence, the defendants are to pay 40*s*.)

Brown consented to abandon the second count; and he was not called upon by the Court to reply as to the other.

(1) For exposing the plaintiff's see *Hardy v. Veasey* (1868) L. R. 3 Ex. account to Lord De L'Isle. As to this, 107, 37 L. J. Ex. 76.—J. G. P.

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It seems to me to be quite clear, that the account in question is a banking account of the ordinary kind, by the plaintiff, on his own account, with the London and County Joint-Stock Banking Company; and that it is not competent to any third party to interpose, and to say that the Banking Company in reality contracted with him. This is plainly evidenced by the way in which the account was kept: *it was a general account, embracing as well the plaintiff's own moneys, as moneys received by him in his capacity of agent for Lord De L'Isle, and purporting to be an account between the plaintiff and the bankers only. As between these parties, it seems to me that the cheque was the property of the plaintiff. But, at all events, after it was turned into money, the bankers were indebted to him as for money had and received to his use, or money lent, and became liable to account to him for it whenever he chose to call for it. It was perfectly competent to Lord De L'Isle to allow his agent to receive money on his account, and to deal with it as if it were his own; and the evidence shows that that was the state of things before the plaintiff was told that his authority to interfere with Lord De L'Isle's property was put an end to, and that he was to confine himself in future to giving orders to the men. It appears that he had before this, being duly authorised so to do, sold some corn to Vines and Tomlin. He might very well suppose, notwithstanding his authority as agent was to some extent recalled, that that did not prevent him from completing transactions which he had already commenced on Lord De L'Isle's account. But, assuming that the plaintiff had no authority to receive this cheque, and that he received it under a tacit assertion that he had authority; still, having got the cheque and given it to his bankers, it seems to me that it was not competent to the bankers to say that they did not receive the money on his account, because he obtained the cheque in a wrongful manner. The result of the case, in my view, is, that the money in question was, at the time it reached their hands, money lent by the plaintiff to the Banking Company, or money had and received by them to his use: and it would have continued so, if Lord De L'Isle had not interfered. At the utmost, Lord De L'Isle's rights accrued only after the *liability of the Banking Company to the plaintiff arose: and that would be a matter of excuse, which should have been pleaded. But, putting that out of the question, it seems to me, that the Banking Company, having received the money on behalf of the plaintiff, and given him credit

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for it, became debtors to him for the amount ; and that the circumstance that the receipt of the cheque by the plaintiff might have been blameable, does not afford any answer to this action. The transaction was regular and lawful so far as the plaintiff and the bankers were concerned : it was a simple transaction of loan ; and consequently I think the plaintiff is entitled to recover in the first action.

As to the second action, I am of opinion that the plaintiff must have a verdict for 40s. upon the first count, and that the defendant is entitled to a verdict on the second count.

CRESSWELL, J. :

I am of the same opinion. The account purported to be an account between the plaintiff and the Banking Company only : there is no pretence for saying that Lord De L'Isle had anything to do with it. It is said that the cheque of Vines and Tomlin was received by the plaintiff in defiance of an order from Lord De L'Isle not to receive it. Assume that it was : if the plaintiff had himself received the cash for that cheque, and had paid the money in to his account with the Banking Company, they clearly would have been responsible to him for it : and I cannot see that it makes the slightest difference, that, instead of doing so, he handed the cheque to the bankers to get cashed, they having no notice at the time they obtained the money for it, that the cheque was not the property of the plaintiff. As to the plaintiff's being unauthorised to receive this cheque, I cannot help thinking there is a good deal of doubt about that. It seems that Lord *De L'Isle was dissatisfied with the state of the account between himself and the plaintiff, and that Mr. Glendinning, at his request, intimated to the plaintiff that he was to deal no more with his Lordship's property. It may be very questionable whether the plaintiff might not fairly have understood that as prohibiting him from making any more sales, but not from getting in money from persons to whom he had already sold corn,—especially as he does not seem to have been asked to render an account of the sales which he had already effected. The case of *Hardman v. Willcock* (1) differs essentially from this case. There, the plaintiff had obtained possession of the goods by a fraud between him and the insolvent, and therefore could be in no better situation than the insolvent himself : the goods not being in reality the plaintiff's goods, the rights of the assignees intervening, the defendant was not bound to account to him for the proceeds of the sale.

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(1) 35 R. R. 566 (9 Bing. 382 (u)).

WILLIAMS, J. :

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I am of the same opinion. If we were to decide otherwise, I think we should be promulgating a doctrine that would be found very injurious to bankers.

As to the second action, I think the second count does not disclose a cause of action. But all difficulty as to that is removed by *Mr. Brown's* concession that a verdict may be entered for the defendant as to that count.

Judgment accordingly.

HITCHINS v. THE KILKENNY RAILWAY COMPANY (1).

(9 C. B. 536—541.)

1850.
Feb. 16.
[586]

By the 65th section of the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, it is provided that all the money raised by the Company, whether by subscriptions of the shareholders, or by loan, or otherwise, shall be applied, firstly, in paying the costs and expenses incurred in obtaining the special Act, and all expenses incident thereto, and, secondly, in carrying the purposes of the Act into execution : Held, that the expenses of obtaining the special Act were recoverable against the Company in an action of debt.

DEBT. The first count of the declaration stated, that, before and at the time of the passing and coming into operation of the Kilkenny and Great Southern and Western Railway Act, 1846 (2), and before the commencing of this suit, to wit, on the 7th of August, 1846, there was due to the plaintiff a large sum, to wit, 3,000*l.*, for costs and expenses by the plaintiff, before the passing of the said Act, incurred in obtaining the said Act, and for expenses incident thereto, to wit, for the price and value of work before the passing of the said Act done, and materials for the same provided, by the plaintiff, and for money by the plaintiff before the passing of the said Act, paid, laid out, and expended in and about obtaining the said Act and in and about divers other matters, things, and expenses necessarily incident thereto : that, after the passing and coming into operation of the said Act, to wit, on the 18th of August, 1846, the defendants had notice of the premises, and that the said sum was so as aforesaid due to the plaintiff for costs and expenses incurred in obtaining the said Act, and for expenses incident thereto : that afterwards, to wit, on the day and year last mentioned, and on divers other days and times between

(1) Cited, *In re Skegness and St. Leonard's Tramways Co.* (1888) 41 Ch. Div. 215, 235, 238, 58 L. J. Ch. 737, 60 L. T. 406.
(2) 9 & 10 Vict. c. cclxx.

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that day and the commencement of this suit, they, the defendants, being "The Kilkenny and Great Southern and Western Railway Company" in the said Act mentioned, *by virtue of the said Act, and of the powers and provisions therein contained in that behalf, raised and received divers sums of money, amounting in the whole to a large sum, to wit, 20,000*l.*, being more than sufficient to pay and satisfy all the costs and expenses incurred in obtaining the said Act, and all expenses incident thereto, and of which said sums so raised and received by the defendants as aforesaid they the defendants, at the time of the making of the request by the plaintiff hereinafter next mentioned, had in their hands a large sum, to wit, 5,000*l.*, out of which the defendants could and might and ought to have paid and satisfied the plaintiff the said sum so due to him as aforesaid, to wit, the said sum of 3,000*l.*: that thereupon it became and was the duty of the defendants, out of the said sums of money so raised and received by them as aforesaid, to pay to the plaintiff the said sum so due to him as aforesaid, and the defendants, after the said sums of money had been by the defendants so raised and received as aforesaid, to wit, on the 1st of July, 1847, were requested by the plaintiff to pay him the said sum so due to him as aforesaid: Yet that the defendants did not then apply, nor had they ever in any manner whatsoever applied, the said sums of money so by them raised and received as aforesaid, or any part thereof, in or towards paying or discharging the said sum so due to the plaintiff as aforesaid; and that thereby, and by reason of the non-payment of the said sum, an action had accrued, &c.

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To this count the defendants demurred specially, assigning for causes, that the said first count discloses no ground or cause of action upon which the defendants are liable to be sued, inasmuch as there is no statute which casts any duty or liability upon them, as a Company, and in a corporate capacity, to pay the moneys sought to be recovered by the first count, out of the first *moneys coming to their hands, as alleged in the first count; that it appears by the said first count, that no legal claim existed against any person before the passing of the said Act in the first count of the declaration mentioned, in respect of the claims and causes of action in that count mentioned, inasmuch as it does not appear in and by the first count that the said work and labour therein mentioned was done or bestowed, or the said money paid, by or in consequence of any request from any one, or in any wise on the contract of the defendants, and the said Act of Parliament does

not give the plaintiff any claim against the defendants which the plaintiff had not before against some individual; that the said first count discloses no privity of contract between the plaintiff and the said Company, and it is not shown therein that the debts therein mentioned were contracted at the request of the defendants; that, if the said first count is based upon any statute, such statute should have been followed, and the specific remedy therein provided should have been adopted; that the said first count discloses (if any cause of action whatever) a common law duty, and a breach of it, for which an action on the case ought to have been brought; that the said first count should have shown that the works therein mentioned, and the money therein stated to have been paid by the plaintiff for the said Company, were done and performed and paid respectively at the request of the said Company; and that, if the plaintiff complains of a misapplication of the funds of the Company, such complaint is properly a ground for an action on the case, and not for an action of debt.

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The plaintiff joined in demurrer.

Pearson, in support of the demurrer:

The first count is clearly bad. It does not allege that any money was *due to the plaintiff upon any contract before the passing of the Act: every word contained in the declaration may be perfectly true, and yet the plaintiff may have no cause of action against the Company. The money claimed may be due from somebody other than the Company. Reliance will be placed, on the part of the plaintiff, upon the 65th section of the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, which provides "that all the money raised by the Company, whether by subscriptions of the shareholders, or by loan, or otherwise, shall be applied, firstly, in paying the costs and expenses incurred in obtaining the special Act, and all expenses incident thereto, and, secondly, in carrying the purposes of the Company into execution." If the plaintiff complains of any misapplication of the funds collected by the Company, the proper remedy would have been by an action upon the case. * * *

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(WILLIAMS, J.: How do you distinguish *Carden v. The General Cemetery Company* (1) from the present case?)

There, the question arose, not on demurrer to the declaration, but

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to the plea: and it arose under a statute which contained no clause similar to the 142nd section of the Act now under consideration, which enacts, that, "in all cases where any damages, costs, or expenses, are by this or the special Act, or any Act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be *ascertained and determined by two justices; and, if the amount so ascertained be not paid by the Company, or other party liable to pay the same, within seven days after demand, the amount may be recovered by distress of the goods of the Company or other party liable as aforesaid: and the justices by whom the same shall have been ordered to be paid, or either of them, on application, shall issue their or his warrant accordingly." The plaintiff's remedy was under that clause: *Crisp v. Bunbury* (1).

Unthank, contra:

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This is not a case in which the justices have any jurisdiction. The Act contemplates several things, amongst others, the ascertainment of the amount of the expenses, and that moneys have come to the hands of the Company, which could not be inquired into by justices. The 142nd section, therefore, has no application to a debt in respect of services rendered in relation to the formation of the Company. The general point is settled by *Tilson v. The Warwick Gas-Light Company* (2) and *Carden v. The General Cemetery Company* (3). In the former, an Act of Parliament for incorporating a Gas-light Company enacted that all the costs of obtaining the Act should be paid and discharged out of the moneys subscribed, in preference to all other payments; and it was held, that the attorneys who obtained the Act might maintain an action of debt, founded upon the statute, for their costs. And in the latter, by the Act incorporating the Company, they were to apply the first moneys received under the Act in discharge of expenses incurred in obtaining the Act; and it was held, that the plaintiff, though a member of the *Company, might sue them (*in indebitatus assumpsit*) for his time and trouble, and money expended, in obtaining the Act. The judgment of the Court in the latter case is quite decisive.

(1) 34 B. R. 747 (8 Bing. 394).

(3) 50 R. R. 682 (5 Bing. N. C. 253 ;

(2) 28 R. R. 529 (4 B. & C. 962 ; 7 Scott, 97).

Dowl. & Ry. 376).

MAULE, J. :

We all think it is impossible to distinguish this case from *Tilson v. The Warwick Gas-Light Company*, and *Carden v. The General Cemetery Company*.

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Judgment for the plaintiff.

YATES AND OTHERS v. HOPPE.

(9 C. B. 541—550 ; S. C. 19 L. J. C. P. 180 ; 14 Jur. 372.)

1850.
Feb. 13.

[541]

Where money is paid by A. to B., to be applied by the latter pursuant to a binding contract between the parties, A. cannot revoke its destination.

A., the drawer of an accommodation bill, a few days before its maturity, handed over money to B., the acceptor, for the purpose of meeting the bill. A *fiat* having been issued against A. between the day of the deposit and the maturity and payment of the bill: Held, that, the money having been handed over to B. in pursuance of a binding contract, upon a good consideration, viz. an implied contract of indemnity, the bankruptcy of B. was no revocation of A.'s authority to apply the money in satisfaction of the bill: and consequently that B.'s assignees could not recover it back from him in an action for money had and received to their use.

ASSUMPSIT for money had and received by the defendant to the use of the plaintiffs as assignees of Samuel Seal, after the bankruptcy of Seal.

The defendant pleaded, except as to *3l. 5s. 5d.*, *non assumpsit*, and as to that sum, payment into Court.

The plaintiffs joined issue on the first plea, and as to the *3l. 5s. 5d.*, accepted it in satisfaction *pro tanto*.

The cause was tried before Cresswell, J., at the first sitting in London in Michaelmas Term last. It appeared that the action was brought to recover a sum of 200*l.*, which was handed by the bankrupt, a few days before the issuing of a *fiat* against him, to the defendant, *for the purpose of enabling the latter to take up a bill for 196*l.* 14*s.* 7*d.*, which he had accepted for the bankrupt's accommodation. The examination of the defendant before the Commissioner, which was put in, showed that the bankrupt had brought the 200*l.* to him in bank-notes on the 15th or 16th of March, 1849, and that the defendant paid the bill when presented at its maturity on the 23rd of the same month, with the same notes which had been handed to him by the bankrupt.

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The *fiat* against Seal was issued on the 21st of March.

The learned Judge left it to the jury to say, first, whether the payment by the bankrupt to the defendant was a voluntary payment; secondly, whether it was made in contemplation of

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bankruptcy; thirdly, whether it was intended as a payment, or whether the money was delivered to the defendant merely as a stakeholder, to hand it over to the person who might be entitled to receive it as holder of the bill.

The jury found, first, that the payment was voluntary; secondly, that it was not made in contemplation of bankruptcy; thirdly, that the money was delivered to the defendant for the purpose of being kept by him until the bill arrived at maturity, and of being then paid over to the person who might present the bill.

The learned Judge thereupon directed a verdict to be entered for the plaintiffs, reserving leave to the defendant to move to set it aside, and enter a verdict for him, if the Court should be of opinion that the above state of facts, and the finding of the jury thereon, entitled him to do so.

Byles, Serjt., in the same Term, obtained a rule *nisi* accordingly.

H. Mills now showed cause:

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The authority of the *defendant to apply this money in satisfaction of the bill, was revoked by the intervening bankruptcy of the drawer, and the money became from that moment the property of the assignees. Where money is placed in the hands of an agent for the purpose of being paid over, it remains until it is paid over the property of the depositor, and the authority of the agent is revocable at any time; and the acceptor of an accommodation bill has no greater authority in this respect than an ordinary agent: *Williams v. Everett* (1); *Wedlake v. Hurley* (2); *Toovey v. Milne* (3); *Simpson v. Sikes* (4); *Moore v. Barthrop* (5). It was contended, on moving for this rule, that the money in question was paid pursuant to a contract between the bankrupt and the defendant, to apply it to the purpose for which it was left with the defendant, and therefore that the payment was irrevocable, inasmuch as it was made pursuant to an authority which was coupled with an interest. There was no evidence of any such contract, and no principle of law to warrant that position. What is the contract which the drawer of an accommodation bill enters into with the acceptor? It is an open contract of indemnity: *Reynolds v. Doyle* (6); and see the precedents in 2 Chitty on Pleadings, 7th edit., p. 232, Pearson

(1) 13 R. R. 315 (14 East, 582).

(4) 6 M. & S. 295.

(2) 35 R. R. 688 (1 Cr. & J. 83).

(5) 1 B. & C. 5; 2 Dowl. & Ry. 25.

(3) 53 R. R. 147 (2 B. & Ald. 683).

(6) 56 R. R. 527 (1 Man. & G. 753).

on Pleading, 134. To give a man an authority coupled with an interest, there must be a good consideration existing at the time: *Walsh v. Whitcomb* (1); *Gaussen v. Morton* (2); *Smart v. Sandars* (3). The only exception, if it be one, is, where the authority has been assented to by all parties. [He cited *Walker v. Rostrom* (4).] Here, however, there was no consideration: there was no debt due from the bankrupt to the defendant during the currency of the bill, but a mere possibility of contingent damage.

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(WILLIAMS, J. : After depositing the money with the defendant, was Seal any longer under any duty to indemnify the defendant ?)

If the view of the contract presented by the plaintiffs be correct, clearly not.

(WILLIAMS, J. : What plea would you plead, to a declaration against him for not indemnifying ?)

A special plea setting out all the circumstances.

(TALFOURD, J. : You say he could not plead that he had indemnified the acceptor ?)

Precisely so. The jury have found as a fact that the bankrupt had no intention that the defendant should *have any other interest in the money than that of an ordinary stakeholder.

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(MAULE, J. : It is quite clear that the payment was not meant as a payment out and out under all circumstances; for instance, the defendant would have had no right to retain the money, if he was never called upon to pay the bill at all. The money was to be paid over on the bill being presented. The question is, whether this appropriation of the money was revocable.)

The mere coincidence of authority and interest will not make that irrevocable which would otherwise have been revocable. *Humphries v. Wilson* (5) is substantially this case. [He also cited *Buchanan v. Findlay* (6), *Guthrie v. Crossley* (7), and *Abbott v. Lawrence* (8)].

(1) 2 Esp. N. P. C. 565.

(6) 9 B. & C. 738; 4 Man. & Ry.

(2) 34 R. R. 558 (10 B. & C. 731; 593.

5 Man. & Ry. 613).

(7) 2 Car. & P. 301.

(3) 75 R. R. 849 (5 C. B. 895).

(8) Cited in *Abbot v. Pomfret*, 1

(4) 60 R. R. 770 (9 M. & W. 411).

Bing. N. C. 462.

(5) 2 Stark. N. P. C. 566.

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Here, the defendant was merely an agent to pay the bill: *Reay v. Packwood* (1). * * The payment here was voluntary and without consideration: there was no subsisting debt; and, if there had been, the defendant could not avail himself of mutual credit as a defence under *non assumpsit*: *Wood v. Smith* (2); *Pearson on Pleading*, 393.

(MAULE, J. : That surely cannot be so.)

Byles, Serjt., in support of the rule :

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The jury having disposed of the question of fraudulent preference, it is now sought to get rid of the effect of their finding, by saying that the payment by the bankrupt to the defendant was revocable. It is submitted, however, that that argument cannot be sustained, first, because the payment was made in pursuance of the bankrupt's implied undertaking to indemnify the defendant against the consequences of his acceptance: and, further, it is submitted, that, even if there were no such implied undertaking, a new contract arose upon a sufficient consideration; and that, when the defendant obtained possession of the money, he became an acceptor for value. The first ground, however, will suffice to dispose of the case. The contract into which the drawer of an accommodation bill enters with the acceptor is, that he will provide funds to meet the bill, or take it up himself, or indemnify the acceptor against the consequences of his omission to do so. The declaration in *Reynolds v. Doyle* (3) was framed upon a *breach of the contract to indemnify. That case shows that the drawer's contract is, to do that which an ordinary acceptor for value is bound to do. If the bill is made payable at a particular place, as between the drawer and the accommodation acceptor, the latter is not bound to have the money there, but the former is; and, if he has it there, it is in pursuance of his original contract. In *Young v. Hockley* (4), the declaration, in *assumpsit* by an accommodation acceptor against the drawer, alleged the promise to be, that the defendant "would pay the said bill, or supply the plaintiffs with property for payment thereof, when it became due, and would indemnify and save the plaintiffs harmless against all costs, charges, and expenses which they would sustain by reason of their acceptance thereof." That is the true contract which the drawer enters into. This payment, therefore,

(1) 7 Ad. & El. 917.

(2) 4 M. & W. 522.

(3) 56 R. R. 527 (1 Man. & G. 753).

(4) 3 Wils. 346.

was a payment made by the bankrupt in pursuance of his original liability : it was not even a premature payment.

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(WILLIAMS, J. : Suppose there had been no bankruptcy, and, the bill being due, the accommodation acceptor omits to apply the money in payment of it, and afterwards is sued upon it, and pays the amount, and the costs of the action, and afterwards sues the drawer upon the contract of indemnity,—how would you set up the previous payment ?)

By alleging, that, before breach, a new contract was entered into between the parties, by which the drawer was discharged.

(MAULE, J. : Probably it might be said in that case that there was no promise to indemnify.)

If so, the answer would arise on *non assumpsit*, or a traverse of the damnification. The matter, however, has been decided. Lord ELLENBOROUGH, in *Willis v. Freeman* (1), says : “ The case of *Wilkins v. Casey* (2) has established, that, if a *man who has funds in his hands belonging to a trader who has committed a secret act of bankruptcy, accept a bill for that trader, without knowing of such act of bankruptcy, he may apply those funds, when the bill becomes due, to the discharge of his own acceptance, though a commission of bankruptcy may have issued in the interim, and will be protected against any claim the assignees may afterwards make upon him in respect of the funds so applied.”

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(MAULE, J. : At all events, it is mutual credit.)

In *Madden v. Kempster* (3), it was ruled by Lord ELLENBOROUGH, that, if A. is under acceptance to B., he may retain money of B.'s in his hands to discharge it, either until the bill is delivered up to him, or until he receives a bond of indemnity against being sued upon it. In *Morse v. Williams* (4), it was held, that, where a sum of money has been lodged with a party, to indemnify him against bills of exchange he has accepted for the accommodation of another, an action will not lie against him to recover the money while the bills are outstanding, although the Statute of Limitations has run upon them.

(1) 12 East, 656, 659.

(3) 1 Camp. 12.

(2) 4 R. R. 558 (7 T. R. 711).

(4) 14 R. R. 769 (3 Camp. 418).

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(CRESSWELL, J. : I feel a difficulty in discovering a consideration for the new contract which you rely on. That matter was a good deal discussed in *Walker v. Rostron* (1).)

MAULE, J. :

[*549]

This is an action for money had and received, brought by the assignees of a bankrupt to recover a sum of money paid by the bankrupt to the defendant before the bankruptcy. The payment, it appears, was made voluntarily, but not in contemplation of bankruptcy, and was for the purpose of enabling the defendant to take up a bill which he had accepted for the bankrupt's accommodation. Under these circumstances, the case seems to reduce itself to the same question as if the action were brought by the bankrupt *himself. The circumstances under which the money was paid were these : The defendant had, at the request, and for the accommodation of the bankrupt, accepted a bill for 196*l.* 14*s.* 7*d.* It does not appear that there was any special agreement between the parties : but it is clear that there is an implied contract in all these cases, that the person for whose accommodation the acceptance is given shall provide for the bill, or in some way take care that the acceptor shall not be damnified by his acceptance. That is the situation in which this bankrupt stood to the defendant. The bill being within a few days of its maturity, the bankrupt handed to the defendant a sum of money, which the jury find was handed over for the express purpose of taking up the bill when it should be presented for payment. The question is, whether the bankrupt could have revoked that destination of the money, and could have called upon the defendant to return it to him. The ground upon which the defendant contends that he could not, is, that the contract affords a defence : and it seems to me that it does, because the drawer of the bill, being under an obligation, not specifically to provide funds at a particular time to meet the bill, but one which might be performed in the whole or in part by doing so, adopts a reasonable and usual course for that purpose, by providing the acceptor beforehand with a sum of money to be applied to the payment of the bill. An act done in performance of a binding contract is not revocable. The acceptance of the bill was a good consideration for the contract to indemnify. An ordinary mode of indemnification is, to provide funds to meet the bill. That mode the drawer has adopted. In ordinary cases, where a man is bound

to pay money on or before a given day, a payment made before the day is not revocable. This is a case of that nature: the drawer, by handing to the acceptor the sum necessary to meet the bill, discharged *himself by performance of his contract. As he could not have recalled the payment, so neither can his assignees. The money clearly never was money had and received by the defendant to their use; and, consequently, the rule to enter the verdict for the defendant must be made absolute.

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CRESSWELL, J. :

The case is to be considered quite independently of the bankruptcy of Seal, the jury having found that the payment, though made voluntarily, was not made in contemplation of bankruptcy. The bankrupt could not, I apprehend, have recovered back the money. *Walker v. Rostron* was a totally different case from this. The acceptance of the bill by the defendant was ample consideration for the bankrupt's promise to indemnify him, in any of the ordinary modes of indemnification. The payment was, therefore, a payment made in pursuance of a promise made upon good consideration; and the bankrupt could not revoke it. His assignees, therefore, have no claim.

WILLIAMS, J. :

The bankrupt was under an implied contract, founded upon a good consideration, to indemnify the defendant against the consequences of his acceptance. He elected the mode of performing his contract, by providing funds to meet the bill. It was not competent to him afterwards to recall that step, and claim the money.

TALFOURD, J. :

Lord ABINGER's judgment in *Walker v. Rostron* in principle decides this case. By handing over the money to the defendant, the bankrupt was taking lawful means to perform his contract. He could not retrace his steps: and his assignees can be in no better situation.

Rule absolute.

1850.
April 25.

MARSH v. HIGGINS AND ANOTHER.

(9 C. B. 551—570; S. C. 19 L. J. C. P. 297.)

[551]

Clear and unambiguous words are necessary to give a retrospective effect to an Act of Parliament, so as to deprive a party of a vested right of action.

THIS was an action of assumpsit by the indorsee against the acceptors of a bill of exchange.

The defendants pleaded, first, a traverse of the indorsement by the payees to the plaintiffs. Secondly, [a plea framed on sections 224 and 225 of the Bankruptcy Act, 1849 (which are set out below), alleging a release by a deed of arrangement executed on the 1st of November, 1847].

[557]

To the second plea, the plaintiff replied that he had no notice of the deed, upon which issue was joined.

The writ was issued on the 2nd of July, 1849: the declaration was delivered on the 8th of August, and the defendants pleaded on the 1st of November in the same year. The statute 12 & 13 Vict. c. 106, upon which the second plea was framed, received the Royal assent on the 1st of August, 1849, and came into general operation on the 11th of October, 1849.

The cause was tried before Wilde, Ch. J., at the sittings in London after last Hilary Term. * * *

[558]

On the part of the plaintiff, it was submitted that there was no evidence at all to support the second issue; * * and, further, that the plea, if proved, afforded no answer to the action.

A verdict was found for the plaintiff on the first issue, and for the defendants on the second; and leave was reserved to the plaintiff to move to enter the verdict for him on the second issue, or for judgment *non obstante veredicto*.

Keating, on a former day in this Term, moved accordingly:

[559]

* * The plea is clearly a bad plea. The 224th section of the 12 & 13 Vict. c. 106, enacts, "that every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six-sevenths in number and value of those creditors whose debts amount to 10*l*. and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed

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such deed or memorandum of arrangement, as if they had duly signed the same: and such deed or memorandum, when so signed, shall not be, or be liable to be, disturbed or impeached by reason of any prior or subsequent act of bankruptcy: provided always that every creditor shall be accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him." The 225th section then provides, "that no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall within such time obtain from the Court an order or certificate of the said Court, declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for *the Court, within the district of

[*560]

which the trader shall have resided or carried on business for six months next immediately preceding his suspension of payment, to make such order or certificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application; and no creditor who shall not have had fourteen days' notice of any intended application for such order or certificate as aforesaid, shall be bound thereby." The notice contemplated by this section must be a notice under, and given subsequently to, the passing of the Act. The Legislature clearly could not have intended to render valid a previous notice. That which is relied on as a notice here, took place on the 6th, or the 26th, of January, 1848. It could have no effect whatever until the Act passed; and the Act did not come into operation until the 11th of October, 1849, which was after the commencement of the action, and after issue joined. The notice clearly was intended to be prospective: consequently, the plea is bad.

(CRESSWELL, J.: The 224th section is prospective.)

The 225th cannot, by any fair intendment, be so construed. * * *

WILDE, Ch. J.:

This rule is moved on two grounds: first, to enter a verdict for

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[*561]

the plaintiff on the second *issue, which is joined upon the question whether or not the plaintiff had notice of the deed referred to in the second plea; secondly, to enter a verdict for the plaintiff on the second issue *non obstante veredicto*, on the ground that the plea, if proved, is no answer to the action.

[*562] * * As to the motion to enter judgment *non obstante veredicto*, the rule may go.

CRESSWELL, J.:

[*563] I agree with my Lord that there is no ground for disturbing the finding of the jury upon the second issue. * * The other branch of the motion, *as to the validity of the plea, raises a question that is well worthy of consideration.

The rest of the COURT concurring, a rule *nisi* was granted to enter judgment *non obstante veredicto* on the second issue.

Byles, Serjt., and *Aspland*, showed cause:

The main question is, whether the 12 & 13 Vict., which came into operation after the commencement of the action, but before plea pleaded, is applicable to this case? The 224th section, upon which this plea is founded, clearly applies to past deeds: it speaks of "every deed or memorandum of arrangement now or hereafter entered into." That is the substance of the thing: the notice is a mere incident. The 226th, 227th, 228th, and 229th sections also clearly are retrospective as well as prospective. Where the provision is intended to be prospective only, as in ss. 135, 136, 137, the words "after the commencement of this Act" are used. Section 201 is both prospective and retrospective in its language. The 211th and following sections are prospective only. There is no clause providing that the Act shall be construed beneficially for creditors.

(WILDE, Ch. J.: I do not wonder at the omission; for, many Judges have said that they did not know what it meant.)

There can be no hardship in putting such a construction upon the Act, which was intended to favour these arrangements, as will deprive a hostile creditor of the power of harassing his debtor.

(WILDE, Ch. J.: To justify us in construing a statute to be retrospective, the words must be very explicit.)

That, no doubt, is the general rule, as is laid down in *Moon v. Durden* (1), where it is said that “the general rule, in construing recent statutes, *is, ‘*Nova constitutio futuris formam imponere debet, non præteritis*’; but that rule, which is one of construction only, will yield to a sufficiently expressed intention of the Legislature that the enactment should have a retrospective operation.” Many instances might be cited, of statutes, the language of which construed grammatically would import the future only, being read retrospectively. Thus, in *Towler v. Chatterton* (2), the 1st section of Lord Tenterden’s Act, 9 Geo. IV. c. 14,—which enacts, “that, in actions of debt, &c., no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the Statute of Limitations (21 Jac. I. c. 16), or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby,” was held to have a retrospective operation. The same point had already been ruled by Lord TENTERDEN, in *Hilliard v. Lenard* (3), and *Ansell v. Ansell* (4) and by HULLOCK, B., in *Kirkhaugh v. Herbert* (5). So, in *Freeman v. Moyes* (6), under the 3 & 4 Will. IV. c. 42, s. 31, executors were held liable to costs in actions commenced before the statute came into operation, and tried after. And see *Doe d. Payne v. The Bristol and Exeter Railway Company* (7).

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[*564]

The plea alleges that the defendants had suspended payment before the making of the deed, and that the plaintiff, to wit, on the 1st of November, 1847, had notice of the suspension, and of the deed. The day, though laid under a *videlicet*, being material, the *videlicet* may be rejected. The word “month” in the *plea must, at all events after verdict, be read with the aid of the interpretation clause, and therefore means “calendar month.” Reading it with the context, even without the aid of the interpretation clause, it must be so intended: *Titus v. Lady Preston* (8); *Lang v. Gale* (9); *Cockell v. Gray* (10).

[*565]

(CRESSWELL, J.: All the cases on the subject are considered in *Simpson v. Margitson* (11).)

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| (1) 76 R. R. 479 (2 Ex. 22). | 883. |
| (2) 31 R. R. 411 (6 Bing. 258; 3 Moo. & P. 619). | (7) 55 R. R. 632 (6 M. & W. 320). |
| (3) Moo. & Mal. 297. | (8) 1 Stra. 652. |
| (4) Moo. & Mal. 299, n. | (9) 1 M. & S. 111. |
| (5) Carlisle Spring Assizes, 1829. | (10) 3 Brod. & B. 186; 6 J. B. Moore, |
| (6) 1 Ad. & El. 338; 3 Nev. & M. | 483. |
| | (11) 75 R. R. 278 (11 Q. B. 23). |

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Where the opposite party has pleaded over, and the pleading is capable of a construction which will support it, the Court will give it that construction. Besides, the day is involved in the issue ; and the jury have found it. It may be said, as was said in *Gibbons v. Vouillon* (1), that this defence might have been pleaded *puis darrein continuance* : but the three months since the passing of the Act have now elapsed, and the Court will give the right judgment on the whole record, although the prayer of the plea may be informal. * * *

(TALFOURD, J. : The plea is bad or good at the time of pleading.)

The defendants might have pleaded *puis darrein continuance* at Nisi Prius.

Keating and *Winston*, in support of the rule :

[*566]

To give a retrospective construction to an Act of Parliament, the Court will require very clear and unambiguous words indicating an intention on the part of the Legislature that a vested right of action should be thereby affected. *Moon v. Durden* is a strong instance of the disinclination of the Courts to construe statutes retrospectively. PARKE, B., there says (2) : “ It seems a strong thing to hold, that the Legislature could have meant that a party who, under a contract made prior to the Act, had as perfect a title to recover a sum of money as he had to any of his personal property, should be totally deprived of it without compensation. It is a still stronger thing to hold, that, if he has already commenced an action, with an undoubted right to recover both his debt and costs, he should not only forfeit both, but also be liable, as he would in the ordinary course of a suit, to pay the costs of his adversary, by being obliged to discontinue, or be non-prossed, or have his judgment arrested. These considerations afford a strong reason for limiting the operation of the words of this section (3), and holding that they apply to future contracts, and actions on such future contracts, only, at all events, to future actions only, if any distinction can be made in the degrees of apparent injustice.”

(1) 79 R. R. 593 (8 C. B. 483).

(2) 76 R. R. 479 (2 Ex. 22).

(3) 8 & 9 Vict. c. 109, s. 18 : “ All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void ; and no suit shall be brought or main-

tained, in any court of law or equity, for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made.”

In *Hitchcock v. Way* (1) it was expressly decided, that, where the law is altered by statute pending an action, the law as it existed when the action was commenced must decide the rights of the parties, unless the Legislature, by the language used, show a clear intention to vary the mutual relation of such parties.

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(WILLIAMS, J.: This statute violates the general principle of construction, by applying itself to deeds already executed. The difficulty is, to say where that violation is to stop.)

Reading the words of the 225th section fairly and according to their ordinary grammatical construction, they clearly import future dealings only. Many material *words in the clause are wholly inconsistent with any other construction.

[*567]

No doubt, in construing mercantile contracts, "month" may mean lunar or calendar, according to the intention of the parties, as evidenced by custom or the surrounding circumstances. But, in a record, it means *primâ facie* a lunar month only.

(WILLIAMS, J.: Upon this record, it is capable of meaning "calendar month:" and, if so, it must be assumed that the Judge told the jury so.

CRESWELL, J.: What is the object proposed to be attained by the notice?

Aspland suggested that it was to give the creditor an opportunity of inquiring into the genuineness of the deed.

CRESWELL, J.: That's a strong reason for holding the provision in question to be prospective. The creditor would have had no interest in making the inquiry before the passing of this statute.)

WILDE, Ch. J. :

The Court is placed in great difficulty in dealing with this Act of Parliament; and we are by no means enabled to arrive at a satisfactory conclusion as to some parts of it. We must, however, enter upon the consideration of it with a due regard to the well-known general principle, that statutes are not to be held to operate retrospectively, unless they contain express words to that effect. Sometimes, no doubt, the Legislature finds it expedient to give a retrospective operation to an Act to a considerable extent; but then

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care is always taken to express that intention in clear and unambiguous language. It is plain that this Act was meant to be retrospective to a limited extent,—to establish certain deeds executed before the passing of the Act. It is contended that the Act was meant to operate retrospectively in another respect, which is quite contrary to the ordinary practice of the Legislature, viz., to take away an action which has been *well commenced in respect of a vested right. It must have been well known to both branches of the Legislature that strong and distinct words would be necessary to defeat a vested right to continue an action which has been well commenced: and we have carefully considered the Act with a view to discover if it will bear such a construction as is contended for on the part of the defendants; but we are unable to arrive at any certain and satisfactory conclusion in the affirmative. Some expressions have been relied on as showing that a retrospective operation was contemplated. But those expressions do not seem to us necessarily to bear the interpretation sought to be put upon them; for, we find the very same words used elsewhere in a sense which clearly could not be retrospective. The general rule of construction being as I have already stated, viz., that the words of an Act are to be construed to be prospective only, unless the intention of the Legislature to the contrary is unequivocally expressed, and there being nothing to show that the Act was intended to be retrospective with reference to the matter now in question, we must construe it as being prospective only. This action, therefore, having been well brought, and there being nothing in the Act to warrant us in saying that the Legislature meant to take it away, the plaintiff is entitled to the judgment of the Court.

CRESSWELL, J. :

[*569]

I am entirely of the same opinion. At the time this action was commenced, the plaintiff had a clear right to bring it; and it is for the defendants to make out that the statute is retrospective, for the purpose of ousting the plaintiff of that right. If there is any ambiguity in the language of the Act, the defendants' argument fails. I cannot say that the statute has any such effect, though it is possible that it may have been intended to be retrospective. Construing it, *therefore, according to the general rule, we are bound to hold it to be prospective only. The words at the commencement of the 225th section which seem capable of a retrospective construction, are again used at the close of the section,

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where they clearly can only be construed prospectively. Two or three instances have been cited where statutes have been allowed to have a retrospective effect so as to take away a vested right of action. There is no question that such things have occurred, whether intentionally or not, is not for us now to inquire, the language used admitting of no doubt. One of the examples referred to arose upon the 1st section of Lord Tenterden's Act of 9 Geo. IV. c. 14, which was passed for the purpose of relieving parties from the difficulties arising from the doctrine of the revival by new promises of debts barred by the Statute of Limitations. The language of that provision is, that "no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract," &c.,—necessarily referring to the time when the Judge is to determine whether the evidence tendered is sufficient or not. The Court, therefore, could not escape from the inevitable conclusion that the section was intended to have a retrospective operation. The defendants in this case failing to satisfy us that the statute in question is retrospective in the manner contended for, fail to establish the validity of the plea, and, consequently, the plaintiff must have judgment.

WILLIAMS, J. :

I am of the same opinion. It is a general rule, in the construction of Acts of Parliament, that new laws are to be understood to apply to future things, and not to things past. That rule, no doubt, like every other rule of construction, will yield to a clearly expressed intention that the language used should be taken to be retrospective. In that part of *the statute now under consideration, I find no such clearly expressed intention, and therefore I feel bound to hold the Act to be prospective only.

[*570]

TALFOURD, J. :

I am of the same opinion. The general rule of construction is not denied; and it seems to me that its application to this case is sufficiently clear. "Such time," in the 225th section, means such time as a future deed or memorandum of arrangement has been duly signed by or on behalf of a majority of the creditors, and therefore must mean time future,—after the passing of the Act. My brother *Byles* suggests that the Court may give judgment on the whole record, and that, after verdict, it will be assumed that the three months had elapsed after the passing of the Act.

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That, however, would be an unwarrantable application of the rule of pleading. We must construe the pleadings as they are, not as they might have been. This plea being no good bar, the rule for entering judgment for the plaintiff *non obstante veredicto* must be made absolute.

Rule absolute.

1850.
April 15.

[570]

ELLISON v. COLLINGRIDGE.

(9 C. B. 570—573; S. C. 19 L. J. C. P. 268; 14 Jur. 869.)

Held, that an instrument in the following form: "Port of London Sea, Fire, and Life Assurance Company. To the cashier. Fifty-three days after date, credit Messrs. P. & Co., or order, with the sum of 500*l.*, claimed per *Cleopatra*, in cash, on account of this corporation.—A. C., Managing Director," was properly declared on as a bill of exchange (1).

ASSUMPSIT. The first count was upon a policy of assurance made by the Port of London Sea, Fire, and Life Assurance Company. The second count charged the defendant as the drawer of a bill of exchange for 500*l.*, indorsed to the plaintiff. The third count described the same instrument as a promissory note. The fourth count was upon an account stated.

[571]

The defendant pleaded *non assumpsit* to the first and last counts, traversed the drawing and making respectively of the bill and note in the second and third counts, and further pleaded a plea of fraud to the whole declaration.

The cause was tried before Wilde, Ch. J., at the sittings in Middlesex after the last Term. The plaintiff put in an instrument as follows:

"MARINE DEPARTMENT.

"Port of London Sea, Fire, and Life
Assurance Company."

"To the cashier.

"500*l.*

"31, CORNHILL, 10th September, 1849.

"Fifty-three days after date, credit Messrs. Plummer & Co., or order, with the sum of five hundred pounds, claimed per *Cleopatra*, in cash, on account of this corporation.

"AUGUSTUS COLLINGRIDGE, Managing Director."

A verdict was entered for the plaintiff on the second count for 500*l.*, subject to leave reserved to the defendant to enter a verdict for him if the Court should be of opinion that the instrument in question was not a bill.

(1) See now the Bills of Exchange Act, 1882, s. 3.—J. G. P.

Byles, Serjt., now moved accordingly :

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This is not an order to pay a sum of money. It is no more than a direction by the manager of the corporation to the cashier to open a cash credit to the extent of 500*l.* with the persons mentioned in the document.

(WILDE, Ch. J. : What is the effect of that? Does it not mean, "pay them that amount?")

That would depend upon the other side of the account.

(WILDE, Ch. J. : This was the only transaction between the parties.)

Supposing it does amount to an order to pay,—how much is to be paid? That must depend upon whether or not the *payees were debtors to the Company at the maturity of the bill. If they were debtors, it would amount to an order to pay them the balance.

[*572]

(CRESSWELL, J. : We cannot take into consideration any counter claim in construing this instrument.)

This is, in truth, a mere order or direction from a principal to an agent. In *Russell v. Powell* (1), J. M., by indenture assigned to the plaintiff a ninth part of his share in the residue of the estate of T. H. deceased. By an order of the 29th of July, 1842, made in a suit in Chancery, of *Powell v. Norwood*, the VICE-CHANCELLOR ordered the defendants in that suit to retain 250*l.*, being part of the produce of J. M.'s share of the residuary estate of T. H., to be paid to such person as the now defendant and J. M. should jointly direct. It was afterwards agreed between the parties, that 50*l.*, to be considered as part of the sum of 250*l.*, should be paid by the defendant to the solicitors for J. M. and the plaintiff. An action having been brought to recover this sum of 50*l.*, the plaintiff tendered in evidence the following document : "To the executors of T. H., deceased. *Powell v. Norwood*. GENTLEMEN,—We do hereby authorize and require you to pay to Mr. George Powell, or his order, the sum of 250*l.*, being the amount directed by the order of the 29th of July last to be paid to our order. We are, &c., J. M. December 16th, 1842." This document was signed by J. M. only, and was unstamped. It was held (ROLFE, B., *dissentiente*), that it

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was not a bill of exchange, and that it was admissible in evidence without a stamp.

(CRESSWELL, J.: Who ever heard of a negotiable right to be credited in a book?

WILDE, Ch. J.: Suppose this instrument had been accepted by the cashier, what would have been the consequence?)

[*573] He would not have been liable to be called upon to pay it. *This is not unlike the case of *Jenny v. Herle* (1), where it was held that a bill drawn payable out of a particular fund is not a bill of exchange. At the utmost, this is an order to pay out of the moneys of the corporation.

WILDE, Ch. J.:

I think this instrument is a bill of exchange. There is nothing ambiguous in its terms; nothing to be inferred but that the sum therein mentioned is to be paid. As I understand the words "credit in cash," this is an order by one person on another, to hold to the use, or at the command, of a third party, a certain sum. That means "pay the money to him." I see no ground for a rule.

CRESSWELL, J.:

"Credit in cash" clearly means "pay over the money." The case of *Russell v. Powell* differs essentially from this. There, a very special agreement was entered into: but the judgment of ROLFE, B., shows pretty strong reasons for construing the instrument to be a bill of exchange.

WILLIAMS, J.:

I am of the same opinion. "Credit in cash" is equivalent to "pay."

TALFOURD, J., concurred.

Rule refused.

(1) 1 Stra. 591.

ALLEN v. THE SEA FIRE AND LIFE ASSURANCE COMPANY.

1850.
April 18.

[574]

(9 C. B. 574—579; S. C. 19 L. J. C. P. 305; 14 Jur. 870, n.)

An instrument issued by a Company, completely registered pursuant to the 7 & 8 Vict. c. 110, in this form: "Sea, Fire, Life Assurance Company. To the cashier. Thirty days after date, credit Mrs. A., or order, with the sum of 311*l.* 9*s.* 6*d.*, claims per *Susan King*, in cash, on account of this corporation," and signed by two of the directors of the Company: Held, to be a promissory note, and binding on the Company, notwithstanding it might not have been drawn strictly pursuant to the provisions of the deed of settlement, so as to be binding upon the shareholders (1).

ASSUMPSIT. The first two counts were upon a policy of assurance, the defendants being described in the first count to be a Joint-Stock company completely registered, by the name of the Sea, Fire, Life Assurance Society, and to have obtained a certificate of complete registration conformably to the statute 7 & 8 Vict. c. 110, intituled "An Act for the registration, incorporation, and regulation of Joint-Stock Companies."

The third count stated that the defendants theretofore, to wit, on the 28th of October, 1849, made their promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff, in the said note described as Mrs. Ann Allen, or order, the sum of 311*l.* 9*s.* 6*d.*, thirty [*sic*] days after the date thereof, and that the note was unpaid, &c.

The defendants traversed the making of the note mentioned in the third count.

At the trial, before Wilde, Ch. J., at the last Assizes at Maidstone, the plaintiff put in an instrument in the following form, bearing an 8*s.* 6*d.* stamp:

"MARINE DEPARTMENT.

"Sea, Fire, Life Assurance Society.

"81, CORNHILL, October 20th, 1849.

"689,617. 311*l.* 9*s.* 6*d.*

"To the cashier.

"Ninety days after date, credit Mrs. Ann Allen, or order, with the sum of three hundred and eleven pounds, *nine shillings and sixpence, claims per *Susan King*, in cash, on account of this corporation.

[*575]

"A. DAVIS, } Directors."
"W. OGILVIE, }

"Entered, F. F. A., Accountant."

(1) See the Bills of Exchange Act, 1882, s. 5 (2).—J. G. P.

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AND LIFE
ASSURANCE
COMPANY.
[576]

On the part of the defendants, it was submitted that this was not a promissory note at all, but a mere order for the payment of money; and that, if a promissory note, it was not drawn with the formalities required by the statute 7 & 8 Vict. c. 110, s. 45 (1).

Under the direction of his Lordship, a verdict was found for the defendants upon all the issues except the third, which was found for the plaintiff; and leave was reserved to the defendants to move to enter the verdict for them on the third issue also, if the Court should think either of the objections well founded.

Shee, Serjt., now moved accordingly :

1. The instrument produced at the trial was not a promissory note : it was not a note in terms necessarily for the payment of money.

(WILDE, Ch. J. : We held the other day, in *Ellison v. Collingridge* (2), that "credit in cash," without the aid of extrinsic circumstances, meant "pay.")

This is quite consistent with satisfaction by set-off.

(WILDE, Ch. J. : So is a cheque.)

But then it does not appear upon the face of the instrument.

(WILDE, Ch. J. : There is no mutuality between the person to whom the order is addressed and the holder : it is a direction by the employers to their clerk to pay the money.)

This is more like a bill of exchange than a promissory note. It is addressed to a person who is not a member of the corporation,—to one who would have been personally liable upon it if he had accepted it.

(CRESWELL, J. : What more is necessary to make it a promissory note ?

WILDE, Ch. J. : Is not this like a party drawing upon himself ? It has been held that an instrument purposely made ambiguous, may be declared on as a promissory note : *Allan v. Maunson* (3) ; *Edis v. Bury* (4) : and see *Brown v. De Winton* (5).

(1) Repealed by 25 & 26 Vict. c. 89.
See now ss. 41 and 42 of that Act.—
J. G. P.

(2) *Ante*, p. 444.

(3) 4 Camp. 115.

(4) 30 R. R. 389 (6 B. & C. 433).

(5) 77 R. R. 338 (6 C. B. 336).

2. Assuming that this *was* a promissory note, it is not drawn in conformity with the Company's deed of settlement, under which alone it could be drawn. The 23rd clause provides that there shall be not less than three, or more than ten, directors of the Company. The 44th authorises the directors to make, accept, and indorse bills and notes, in the whole not exceeding 100,000*l.*: if they exceed that sum, the shareholders are not liable.

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(CRESSWELL, J.: Are the shareholders charged here?)

They will be, when execution comes to be issued.

(CRESSWELL, J.: It might afford an answer to a motion for leave to issue execution against a shareholder. The instrument is binding upon the Company, though it may not be upon a shareholder, except to the extent of the value of his shares.)

Then, the deed contains no clause empowering two directors to draw or accept.

(CRESSWELL, J.: The 45th section of the 7 & 8 Vict. c. 110, gives authority to two directors to draw: the deed was made after the passing of that Act, and this is one of the very things contemplated by it.)

The note should have been countersigned by the secretary or other appointed officer of the Company.

(WILDE, Ch. J.: This is countersigned by the accountant.)

There was no evidence that he was the appointed officer of the Company.

WILDE, Ch. J.:

I think there should be no rule in this case. The first objection is, that the instrument declared on in the third count is not a promissory note. What is necessary to constitute a promissory note? These parties issue this instrument, importing that the Company promise to pay. The note is addressed by the drawers to their own clerk. My brother *Shee* treats the cashier as a drawer. But at the trial it was insisted for the plaintiff, that the instrument was precisely what we think it is. The Company indicate that they mean to pay, by a direction to their officer to pay, "credit *in cash," meaning, as we held in the former case, "pay;" and they point out to whom payment is to be made. It appears to me that the instrument contains all that is essential

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to constitute a promissory note. It is then said, that assuming it to be a promissory note, it is not made in conformity with the deed of settlement. This note, however, is issued by the Company; and the action is brought against them. The restrictions in the deed cannot be prayed in aid in an action wherein the shareholders do not appear to be charged. What may be its operation as to them remains to be seen. Next it is said that the note does not purport to be signed by all the directors: but that objection is answered by the authority given by the deed, and by the 45th section of the statute, which provides, that, "if the directors of the Company be authorised by deed of settlement or bye-law to issue or accept bills of exchange or promissory notes, then every such bill of exchange or promissory note shall be made or accepted (as the case may be) by and in the name of two of the directors of the Company on whose behalf or account the same may be so made or accepted, and shall be by such directors expressed to be made or accepted by them on behalf of such Company." There is no stipulation in the deed which is inconsistent with that. This note, therefore, is properly signed by two directors. It is next objected that the note is not countersigned by the secretary or other officer appointed by the Company. How are parties to know who is an officer appointed by the Company? By "countersigned," I understand that the instrument must appear to have passed under the signature of some appointed officer. Here, the accountant has authenticated this instrument by his signature. I think there is no foundation for either of the objections.

The rest of the Court concurring,

Rule refused.

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(9 C. B. 580—609; S. C. 19 L. J. C. P. 281.)

A claim for contribution to general average arises only where a part of the cargo is sacrificed for the preservation of the ship and the rest of the cargo from an impending danger: not where a part of the cargo is sold to raise money at a port to which the ship has put back for the repair of damage incurred by ordinary perils of the sea.

THIS was an action of assumpsit. The first count of the declaration stated that the defendants, before and at the several times

(1) Cited, *Atwood v. Sellar* (1880) 5 Q. B. Div. 286, 293, 294, 296, 49 L. J. Q. B. 515, 42 L. T. 644; *Svensden* (or *Svensden*) v. *Wallace* (1884) 13 Q. B. Div. 69, 91, 52 L. J. Q. B. 397 (affd. 10 App. Cas. 404, 54 L. J. Q. B. 497)

hereinafter mentioned, to wit, on the 15th of March, 1847, were owners of and interested in, and in possession of, a certain ship or vessel called the *Harpooner*, then being at a certain port, to wit, at Adelaide, in South Australia, and bound from thence to a certain port in the United Kingdom, to wit, to Swansea, in South Wales: that theretofore the plaintiffs, to wit, on the day and year aforesaid, at the special instance and request of the defendants, caused to be shipped and loaded in and on board of the said ship, at Adelaide aforesaid, divers goods and merchandises of them the plaintiffs, to wit, five hundred tons of copper ore, of great value, to wit, of the value of 20,000*l.*, to be carried and conveyed in the said ship by the defendants for the plaintiffs, from Adelaide aforesaid to Swansea aforesaid, and there, to wit, at Swansea aforesaid, to be delivered by the defendants to the plaintiffs, the dangers and accidents of the seas and navigation only excepted, for certain freight and reward to be paid by the plaintiffs to the defendants in that behalf: That thereupon, afterwards, to wit, on the day and year aforesaid, the said ship set sail and proceeded on her said voyage from Adelaide aforesaid to Swansea aforesaid, with the said goods and merchandises of the plaintiffs, and certain other cargo, on board thereof, and afterwards, and while she was so proceeding on her said voyage, with the said goods and merchandises and cargo on board thereof as aforesaid, *to wit, on the day and year aforesaid, the said ship was, by the force and violence of the winds and waves, and by means of stormy and tempestuous weather, in the course of such voyage, greatly damaged and injured; and thereupon, and in consequence of the said injury and damage so sustained as aforesaid, the master of the said ship did, to wit, on the day and year aforesaid, cause the said ship to, and the said ship did then, put back and sail back again to Adelaide aforesaid, to have the said injury and damage repaired; and the said injury and damage was, by the direction of the said master, to wit, on the day and year aforesaid, then and there repaired: That the costs and expenses thereby then and there incurred by the defendants as owners of the said ship as aforesaid, in and about the repairing the said damage and injury, and in and about the providing the necessary stores and victuals for the supply of the said ship, and the crew thereof, amounted in the whole to a large sum, to wit, to the sum of 10,000*l.*; and, because the master of the said ship had not then, and could not obtain, moneys for the repairs of the said ship, and without such moneys the said ship

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could not then have been repaired, and the same, and the freight to be earned by the carriage of the said goods, would then have become wholly useless and lost to the defendants, the said master did then, for the preservation of their said ship as aforesaid, and in order to enable them to earn the said freight of the said ship for the said voyage as aforesaid, and to pay the costs and expenses so incurred as aforesaid, take a large portion, to wit, three hundred tons of the said copper ore of the plaintiffs, of great value, to wit, of the value of 10,000*l.*, so delivered to them the defendants to be carried and conveyed and delivered to the plaintiffs as aforesaid, and did then sell the same for a certain sum of money, to wit, the sum of 5,000*l.*, with which last-mentioned *sum of money so realised by the sale of the said copper ore as aforesaid, the costs and charges so as aforesaid incurred in and about the premises were paid, to wit, by the defendants; and the said ship afterwards, to wit, on the day and year aforesaid, so repaired, resumed her voyage, and afterwards, to wit, on the day and year aforesaid, arrived in safety at her destined port: That the defendants did then, in consideration of the premises, promise the plaintiffs that they would, on the request of the plaintiffs, pay to them, the plaintiffs, the value of the said copper ore so sold as aforesaid, and contracted to be carried, conveyed, and delivered as aforesaid, for which the same might have been sold, had the same then been delivered by the said defendants to the said plaintiffs at Swansea aforesaid: That the value of the said copper ore so sold as aforesaid, for which the same might have been sold at Swansea aforesaid, had the same then been delivered there to the plaintiffs as aforesaid, amounted to a large sum of money, to wit, the sum of 10,000*l.*, of all which premises the defendants then had due notice, and were afterwards, to wit, on the 1st of June, 1848, requested by the plaintiffs to pay to them the said last-mentioned moneys, &c.

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To this count the defendants pleaded, secondly, except as to the non-payment by the defendants of the sums of 1,680*l.* 17*s.* 8*d.* and 770*l.* 4*s.* 11*d.*, parcels respectively of the said sum of 10,000*l.* for which the said copper ore so sold as in that count mentioned, might have been sold, had the same been delivered by the defendants to the plaintiffs at Swansea aforesaid, as in the said first count mentioned, that, on the occasion of the said ship so being by the force and violence of the winds and waves, and by means of stormy and tempestuous weather, damaged and injured as in the said first count mentioned, the said ship became and was, in *consequence of the

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said injury and damage, the same then being dangers and accidents of the seas and navigation, broken, leaky, dangerous, and incapable of further prosecuting her said voyage, insomuch that it then became expedient and necessary, for the preservation of the said ship and her cargo, and to enable her to complete her said voyage, and to prevent the said ship, with her said cargo, from being wholly lost and destroyed, and for the common benefit and advantage of the plaintiffs and all persons interested in the said cargo, and in the performance or completion of the said voyage, that the said ship should put back and sail back, as in the said first count mentioned, to have the said cargo unloaded and taken from on board the said ship, and the said damage and injury repaired; and the said ship did so sail back and put back, and the master of the said ship did so cause the said ship to sail back and put back as in the first count mentioned, to have the said cargo unloaded, and the said damage and injury repaired, and for the preservation of the said ship and cargo, and to enable the said ship to complete her said voyage, and to prevent the said ship and cargo being wholly lost, and for such common benefit and advantage as aforesaid,—the said port and place to which the said ship so sailed back and put back as aforesaid then being the most proper and convenient port and place in that behalf for the preservation of the said ship and cargo, and at which the said ship could be repaired or made fit to prosecute her said voyage: That the said cargo then was unloaded, and the said ship repaired, for such common benefit and advantage as aforesaid, and not for the exclusive benefit of the defendants, or for the benefit or advantage of the defendants as owners of the said ship more or in a greater degree than of the owners of the said cargo: That the said repairs in the said first count mentioned were necessary and requisite for the *completion of the said voyage, and the said costs and expenses in the first count mentioned were then incurred for the said repairs, and in and about the unloading of the said cargo as aforesaid: That the costs of the said repairs then greatly exceeded the value of the said ship when the same was so repaired, and the said repairs were such as ought not to have been done to the said ship, except for the purposes of conveying the said cargo to the said port of delivery, and the same would not have been done to the said ship, if the said cargo could otherwise have been conveyed to the said port of delivery; and, because the said master was unable, by bottomry, hypothecation, or otherwise than by such sale as hereinafter

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mentioned of part of the said cargo, to raise funds sufficient for the said costs and expenses, or to cause or procure the said repairs to be done on credit, or to convey or cause to be conveyed the remainder of the said cargo to the said port of delivery, to wit, to Swansea aforesaid, he, the said master, in order to complete the said voyage, and to convey the remainder of the said cargo to the said port of delivery, and as a matter of urgent necessity, as the same then was, did, at the time in the said first count in that behalf mentioned, sell the said part of the said copper ore in the said first count in that behalf mentioned, together with certain other goods, being part of the said cargo,—he, the said master, then exercising reasonable and proper discretion and due care and diligence, and, after due deliberation had by him in that behalf, reasonably and *bonâ fide* deeming and considering it to be, as the same in fact then was, the best thing that could be done for all parties concerned in the said voyage, and especially for the owners of the remainder of the said cargo then remaining unsold: That the proceeds of the sale of the said part of the said copper ore so sold as aforesaid, amounted to a certain sum, to *wit, the sum of 1,680*l.* 17*s.* 8*d.*, and no more, although he, the said master, then sold the same for the best price that could be obtained for the same at the said port and place where the same was so sold as aforesaid, and then used due care and diligence and his utmost endeavours to obtain for the said part of the said copper ore so sold as aforesaid the best and highest possible price; and the said part of the said copper ore, and the said part of the said cargo so sold as aforesaid, then being a proper and convenient part to be so sold on such emergency, and being such part as could be sold with as little loss as possible: That the master of the said ship did then, with and by means of the proceeds of the said sale, cause the necessary repairs to be done, and prosecute and complete the said voyage with the said ship, and the remainder of the said cargo, and of the said copper ore so delivered to the defendants, for the purpose in the first count mentioned, and did afterwards, to wit, on the 1st of January, 1848, deliver the same to the plaintiffs at the port of delivery, to wit, at Swansea aforesaid, the same then being of great value, to wit, of the value of 5,000*l.*, and having been safely and securely carried and conveyed on board the said ship from Adelaide aforesaid to Swansea aforesaid: That the value to the plaintiffs of the said part of the said copper ore so sold as aforesaid, if the same had been conveyed to the said port of

delivery, instead of being so sold as aforesaid, would then have been a certain sum, to wit, the sum of 5,707*l.* 3*s.* 4*d.*, and no more; and that, on the occasion aforesaid, by reason of the sale aforesaid, a certain loss (exceeding the value of the said ship when so repaired as aforesaid) was incurred, to wit, to the amount of 4,026*l.* 5*s.* 8*d.*, the same being the difference between the produce of the said sale and the value to the plaintiffs of the said part of the said copper ore so sold as aforesaid, and which *the said part would have been worth if the same had been conveyed to the said port of delivery, instead of being so sold as aforesaid; and the said sum of 4,026*l.* 5*s.* 8*d.* was, on the occasion of the said sale, lost and sacrificed in the manner aforesaid, and for the common benefit and advantage of all parties interested in the said ship or freight, or her said cargo, or the completion of the said voyage; and the said loss was incurred for such common benefit and advantage as aforesaid; and, by the usage and custom of merchants, the said loss and sacrifice so incurred and made as aforesaid was and is the subject of a general average contribution by and amongst all parties interested in the said ship and the said cargo, and the completion of the said voyage, and in the freight to be therein earned by the said ship, in proportion to their respective interests: That the amount of such contribution to be by them, the defendants, contributed in proportion to their interest in the said ship, freight, and cargo, amounted to a certain sum, to wit, the sum of 770*l.* 4*s.* 11*d.*, and no more: That the defendants, by reason of the premises, became and were discharged from the payment of any larger sum in respect of the said copper ore so sold as aforesaid, and the value thereof for which the same might have been sold had the same been delivered by the defendants to the plaintiffs at Swansea aforesaid, other than and beyond the amount of the proceeds of the sale of the said copper ore so sold as aforesaid, to wit, the said sum of 1,680*l.* 17*s.* 8*d.*, and the amount of the said last-mentioned contribution, to wit, the sum of 770*l.* 4*s.* 11*d.*, which said two sums of 1,680*l.* 17*s.* 8*d.* and 770*l.* 4*s.* 11*d.* are the sums in the introductory part of this plea mentioned, and therein excepted.

Third plea, to the first count, so far as the same relates to the non-payment by the defendants of the sum of 3,842*l.* 17*s.*, parcel of the value of the said *copper ore so sold as in that count mentioned, for which the same might have been sold had the same been delivered by the defendants to the plaintiffs at Swansea

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aforesaid, as in the said first count mentioned,—that, on the occasion of the said ship so being, by the force and violence of the winds and waves, and by means of stormy and tempestuous weather, damaged and injured, as in the said first count mentioned, the said ship became and was, in consequence of the said injury and damage, the same then being dangers and accidents of the seas and navigation, broken, leaky, dangerous, and incapable of further prosecuting her said voyage, insomuch that it then became expedient and necessary, for the preservation of the said ship and her cargo, and to enable her to complete her said voyage, and to prevent the said ship, with her said cargo, from being wholly lost and destroyed, and for the common benefit and advantage of the plaintiffs and all persons interested in the said cargo, or in the performance or completion of the said voyage, that the said ship should put back and sail back, as in the said first count mentioned, to have the said cargo unloaded and taken from on board the said ship, and the said damage and injury repaired; and the said ship did so sail back and put back, and the said master of the said ship did so cause the said ship to sail back and put back, as in the first count mentioned, to have the said cargo unloaded, and the said damage and injury repaired, and for the preservation of the said ship and cargo, and to enable the said ship to complete her said voyage, and to prevent the said ship and cargo being wholly lost, and for such common benefit and advantage as aforesaid,—the said port and place to which the said ship so sailed back and put back as aforesaid, then being the most proper and convenient port and place in that behalf for the preservation of the said ship and cargo, and at which the said *ship could be repaired or made fit to prosecute her said voyage; and the said cargo then was unloaded, and the said ship repaired, for such common benefit as aforesaid, and not for the exclusive benefit of the defendants, or for the benefit or advantage of the defendants as owners of the said ship more or in a greater degree than of the owners of the said cargo: That the said repairs in the said first count mentioned were requisite and necessary for the completion of the said voyage: That the said costs and expenses in the said first count mentioned were then incurred for the said repairs, and in and about the unloading of the said cargo as aforesaid, and the costs of the said repairs then greatly exceeded the value of the said ship when the same was so repaired, and the said repairs were such as ought not to have been done to the said ship, except for the purpose of

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conveying the said cargo to the said port of delivery, and the same would not have been done to the said ship if the said cargo could otherwise have been conveyed to the said port of delivery: That, because the said master was unable, by bottomry, hypothecation, or otherwise than by such sale as hereinafter mentioned of part of the said cargo, to raise funds sufficient for the said costs and expenses, or to cause and procure the said repairs to be done on credit, or to convey or cause to be conveyed the remainder of the said cargo to her said port of delivery, to wit, to Swansea aforesaid, he, the said master, in order to complete the said voyage, and to convey the remainder of the said cargo to the said port of delivery, and as a matter of urgent necessity, as the same then was, did, at the time in the said first count in that behalf mentioned, sell the said part of the said copper ore in the said first count in that behalf mentioned, together with certain other goods, being part of the said cargo, and shipped and delivered on board the said ship, to be by the defendants, as owners *of the said ship, conveyed on board the same from Adelaide aforesaid to Swansea aforesaid, he, the said master, then exercising reasonable and proper discretion and due care and diligence, and, after due deliberation had by him in that behalf, reasonably and *bonâ fide* deeming and considering it to be, as the same in fact then was, the best thing that could be done for all parties concerned in the said voyage, and especially for the owners of the remainder of the said cargo then remaining unsold: That the proceeds of the sale of the said part of the said cargo, to wit, the said copper ore and other goods so sold as aforesaid, amounted to a certain sum, to wit, the sum of 2,410*l.* 2*s.* 3*d.*, and no more, although he, the said master, then sold the same for the best price that could be obtained for the same at the said port as aforesaid, and then used due care and diligence, and his utmost endeavours to obtain for the said part of the said cargo so sold as aforesaid the best and highest possible price, and the said part of the said cargo so sold as aforesaid then being a proper and convenient part to be so sold on such an emergency, and being such part as could be sold with as little loss as possible: That the said master of the said ship did then, with and by means of the proceeds of the said sale, cause the necessary repairs to be done, and prosecute and complete the said voyage with the said ship, and remainder of the said cargo, and of the said copper ore so delivered to the defendants, for the purpose in the said first count mentioned, and did afterwards, to wit, on

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the 1st of January, 1848, deliver the same to the plaintiffs at the port of delivery, to wit, Swansea aforesaid, the same then being of great value, to wit, the value of 5,000*l.*, and having been safely and securely carried and conveyed on board the said ship from Adelaide aforesaid to Swansea aforesaid: That the value to the owners of the said part of the said cargo so *sold as aforesaid, was, and, if the same had been conveyed to the said port of delivery, instead of being so sold as aforesaid, would then have been, a certain sum, to wit, the sum of 6,544*l.* 3*s.* 1*d.*; and that, on the occasion aforesaid, by reason of the sale aforesaid, a certain loss, exceeding the value of the said ship when so repaired as aforesaid, was incurred, to wit, to the amount of 4,258*l.* 14*s.* 11*d.*, the same being the difference between the proceeds of the said sale and the value of the said part of the said cargo so sold as aforesaid, and which the said part would have been worth if the same had been conveyed to the said port of delivery, instead of being so sold as aforesaid; and the said sum of 4,258*l.* 14*s.* 11*d.* was, on the occasion of the said sale, lost and sacrificed in the manner aforesaid, and for the common benefit and advantage of all parties interested in the said ship or freight, or her said cargo, or the completion of the said voyage; and the said loss was incurred for such common benefit and advantage as aforesaid; and, by the usage and custom of merchants, the said loss and sacrifice so incurred and made as aforesaid was and is the subject of a general average contribution by and amongst all persons interested in the said ship and the said cargo, and the completion of the said voyage, and in the freight to be therein earned by the said ship, in proportion to their respective interests: That, by the usage and custom of merchants, the said defendants, as owners of the said ship, were and are liable to reimburse and make good to the owners of the said goods so sold as aforesaid, the amount in respect of the said loss to which such last-mentioned owners were and are entitled by reason of such sale: That the said defendants, as such ship-owners, so being liable to reimburse and make good the said loss, were and are, by the said usage and custom of merchants, entitled to receive the contributions to such general average: That *the amount of such contribution to be by the plaintiffs contributed, in proportion to their interest in the said copper ore and cargo, amounted to a certain large sum, to wit, the said sum of 3,842*l.* 17*s.*, whereof the defendants, before the commencement of this suit, to wit, on the 1st of January, 1849, had notice, and the same always had been and still remained unpaid

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and unsatisfied by the plaintiffs; and thereupon, by reason of the premises in that plea mentioned, and by the usage and custom of merchants, the defendants became and were before the commencement of this suit, and thence hitherto had been, and still were, entitled to deduct the last-mentioned sum of money from the said sum in the said first count alleged to be payable from the defendants to the plaintiffs, as the value of the said copper ore so sold as aforesaid, and to set off and allow the said sum of 3,342*l.* 17*s.* against an equal amount of the value of the said copper ore of the plaintiffs so sold as aforesaid, and to have such equal amount liquidated and discharged: That the amount of contribution to be contributed by the plaintiffs as aforesaid, was ascertained before the commencement of this suit, to wit, on the day and year last aforesaid, and the defendants then were, and thence hitherto had been ready and willing to have the amount of the said contribution deducted from the value of the said copper ore, and that an equal amount of the value of the said copper ore should be set off and allowed against the said amount of contribution, and should be thereby liquidated and discharged,—of all which the plaintiffs then, to wit, on the day and year last aforesaid, had notice, and were then, and before the commencement of this suit, required by the defendants to make and allow such allowance, deduction, and set-off as aforesaid; and the defendants thereby, according to the usage and custom of merchants, became and were discharged from the *payment of the said sum of 3,342*l.* 17*s.* in the introductory part of this plea mentioned, the same being equal to and equalled by the amounts of such contribution so to be by the plaintiffs contributed as aforesaid,—verification.

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To these pleas, the plaintiffs demurred specially.

Sir F. Kelly (with whom was *Barstow*), in support of the demurrer :

The facts which appear upon the record are these : The *Harpooner* received on board at Adelaide a quantity of copper ore belonging to the plaintiffs, with which she sailed on her voyage to Swansea. In the course of the voyage, the ship sustained sea damage which compelled her to return to Adelaide. Considerable repairs being found necessary to enable the vessel to pursue her voyage, and the master being unable otherwise to raise money to effect such repairs, and being unable otherwise to forward the rest of the cargo to the port of destination, a portion of such cargo, belonging to the

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plaintiffs, was sold, and the vessel, being repaired, afterwards completed her voyage, and delivered the rest of the cargo at Swansea. The second plea, admitting the facts stated in the declaration, and admitting the liability of the defendants to pay the value of the goods so sold at the port of discharge, alleges that the vessel put back for the common benefit of the plaintiffs and all persons interested in the ship, freight, and cargo, and in the performance of the voyage; that the ship was repaired for such common benefit and advantage, and not for the exclusive benefit of the defendants, or for the benefit or advantage of the defendants as owners of the ship, more, or in a greater degree, than of the owners of the cargo; that the repairs were necessary; that the costs of the repairs greatly exceeded the value of the ship when repaired (not the value of the ship and freight); *that the master, being unable, by bottomry, hypothecation, or otherwise, to raise money to pay for the repairs, or to get them done on credit, as a matter of urgent necessity, sold a portion of the cargo, reasonably and *bonâ fide* considering it to be, as in fact it was, the best that could be done for all parties concerned in the voyage, and especially for the owners of the remainder of the cargo; that the master, with the money thus obtained, repaired the ship, completed the voyage, and delivered the residue of the cargo at its destined port; that the difference between the sum realized by such sale and the price the ore so sold would have fetched at Swansea, was a loss incurred for the common benefit, and was by the usage and custom of merchants the subject of general average contribution by and amongst the parties interested in the ship and cargo, and the completion of the voyage, and in the freight to be therein earned by the ship, in proportion to their respective interests. The allegation is, that the costs of repairing the ship at Adelaide exceeded the value of the ship when repaired, not the value of the ship and freight. This is in truth an attempt to convert a sale of part of the cargo into a jettison. The plaintiffs are clearly entitled to the value which the copper would have realized if it had been delivered according to the bills of lading: *Alers v. Tobin* (1); *Brandt v. Bowlby* (2). This is a claim for general average. The circumstances disclosed upon the record clearly afford no foundation for such a claim.

(WILDE, Ch. J.: Would bottomry interest be general average?)

(1) Cited in Abbott on Shipping, 8th ed. 371, 372 [14th ed. 551]. (2) 36 R. R. 796 (2 B. & Ad. 932).

Certainly not. If there could be a doubt upon the subject, it is removed by the recent case of *Duncan v. Benson* (1). The question is glanced at in *Powell v. Gudgeon* (2); but it was expressly *decided in *Power v. Whitmore* (3). In this latter case, the wages and provisions of the crew, while a ship remained in port, whither she was compelled to go for the safety of ship and cargo, in order to repair a damage occasioned by tempest, were held not to be the subject of general average; nor the expenses of such repair; nor the wages and provisions of the crew during her detention in port, to which she returned, and was detained there, on account of adverse winds and tempests; nor the damage occasioned to the ship and tackle, by standing out to sea with a press of sail in tempestuous weather, which press of sail was necessary for that purpose, in order to avoid an impending peril of being driven on shore and stranded. Lord ELLENBOROUGH there said "that general average must lay its foundation in a sacrifice of part for the sake of the rest; but here was no sacrifice of any part by the master, but only of his time and patience; and the damage incurred was by the violence of the wind and weather." And his Lordship explained and modified a doctrine which had been imputed to him in the report of a former case of *Plummer v. Wildman* (4). Is the case at all varied by the fact that the repairs exceeded the value of the ship, and that the benefit was mutual? If a ship puts back damaged, the master must determine whether he will repair her or not. It may be that it is not his duty to repair, where the cost of repair will exceed the value of the ship and freight when the repairs are executed: but, if he does in fact repair her, he does so as the agent, and upon the sole responsibility, of the owners. That is settled beyond all doubt. [He distinguished *The Gratitude* (5), and referred to *Duncan v. Benson* (1), confirmed by the Exchequer Chamber in *Benson v. Duncan* (6).]

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(WILDE, Ch. J.: If the goods had been hypothecated here, instead of sold, that case would have been precisely this.)

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It would. It is unnecessary to notice the special grounds of demurrer. The pleas are clearly bad in substance.

(1) 74 R. R. 764 (1 Ex. 537).

(2) 17 R. R. 385 (5 M. & S. 431).

(3) 16 R. R. 416 (4 M. & S. 141).

(4) 16 R. R. 334 (3 M. & S. 482).

(5) 3 Rob. Adm. Rep. 257.

(6) 77 R. R. 776 (3 Ex. 644).

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Channell, Serjt. (with whom was *Rex*), *contra* :

The decision in *Duncan v. Benson* does not affect this case to the extent that has been supposed. Since the case of *The Gratitude*, it had been imagined, that, where a *bonâ fide* necessity existed, the master, in selling the goods, acted as the agent of the owner of the goods, and not as the agent of the ship-owner. What *Duncan v. Benson* decided was in truth this, that, where the master, under a justifiable necessity, sells goods, or pledges or hypothecates them, he does so as the agent of the owner of the ship, and not as agent of the owner of the goods, except so far as is necessary to give title to the vendee or pawnee. No point was made there as to whether the case was one of general average. It must be conceded that the shipper is entitled to claim the value of the goods at the port of delivery: that seems to be settled by *Richardson v. Nourse* (1). But the sale having taken place under circumstances of urgent necessity, and for the benefit of all parties concerned, it is properly a subject of general average. * * That the sale here was not for the exclusive benefit of the ship-owners, is clear from the *statement that there were no other means of carrying the residue of the cargo to its destination. [He also cited *Campbell v. Thompson* (2); *Plummer v. Wildman* (3); *Power v. Whitmore* (4); *La Constancia* (5); *The Packet* (6); *Abbott on Shipping* (8th ed. p. 498); and *Benecke's Principles of Indemnity*, p. 271.]

Sir F. Kelly was heard in reply.

WILDE, Ch. J. :

The question presented for our decision in this case is undoubtedly one of considerable importance in its consequences, though it may be doubted whether it be one of much difficulty. The plaintiffs, who had shipped certain copper ore on board the defendants' vessel at Adelaide, to be conveyed to Swansea, bring this action to recover damages for the sale of a portion of the ore at Adelaide, claiming what it would have fetched at the port of delivery—Swansea. The defendants, in their pleas, set out in detail the circumstances under which the sale took place, and, admitting the plaintiffs' right to the proceeds at the port of sale, insist that the rest is in the nature of general average. The pleas, in substance, state, that, after the vessel, with the cargo in question, and other goods on board

(1) 22 B. R. 368 (3 B. & Ald. 237).

(2) 1 Stark. N. P. C. 490.

(3) 16 B. R. 334 (3 M. & S. 482).

(4) 16 B. R. 416 (4 M. & S. 141).

(5) 2 W. Rob. 487.

(6) 3 Mason's Rep. (American) 255.

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belonging to other persons, had sailed from Adelaide, she encountered a storm and sustained damage, and it became necessary for the preservation of the ship and cargo, and to enable her to complete the voyage, that she should put back for repair; that she accordingly did put back, and was repaired for the common benefit and advantage of the owners of the ship and cargo; that the costs of the repairs exceeded the value of the ship when repaired, and ought not and would not have been incurred if the cargo could otherwise have been conveyed to the port of delivery; that the master, being unable otherwise to raise money to pay for the repairs, necessarily sold a portion of the copper, in order to enable him to do the repairs, and convey the remainder to Swansea; that the ship sailed, and the residue of the ore was duly delivered at *Swansea; that the loss on the sale,—the difference between the proceeds of the sale at Adelaide and the value of the ore to plaintiffs if it had been conveyed to the port of delivery,—exceeded the value of the ship when repaired, and was incurred for the common benefit and advantage of the owners of ship and cargo; and that the loss so incurred was by the usage and custom of merchants the subject of a general average contribution between and amongst all parties interested in the ship, freight, and cargo, and in the completion of the voyage; and that the defendants were not liable to contribute to the loss beyond the amount of the proceeds of the sale, and the amount of general average payable by them in respect of their interest in the ship and freight. It is in respect only of the incapacity of the particular ship to carry the goods forward to their destination, that the pleas show that the cargo was in danger of being wholly lost. It is difficult to see how the repair of the ship could be for the benefit and advantage of the plaintiffs. The plaintiffs' goods were of a description not to be deteriorated to any great extent. The pleas allege that the cargo could not be conveyed to its port of delivery by any other ship: but it appears both from the declaration and the pleas, that the cargo consisted of other goods besides those of the plaintiffs; and there is no allegation that the plaintiffs' goods might not have been forwarded by another ship, or that they were in any immediate peril. This, therefore, is the case of ordinary sea damage, which the ship-owner must repair at his own expense. The claim for general average arises where a part of a shipper's goods is sold or destroyed for the purpose of relieving the rest from some impending peril. For instance, in the case of goods thrown overboard to lighten a ship in distress. So,

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the cutting away a mast, or otherwise damaging the ship, in order to *enable her to escape the danger. In those cases, the loss or damage being incurred for the purpose of insuring the safety of the rest of the cargo, or preventing the ship from going to the bottom, it is but reasonable that the expense should be sustained by those for whose benefit it is incurred, in proportion to their several interests. But how is that analogous to this case? The passage cited from Abbott on Shipping, 8th edit. p. 478 (1), is, I think, adverse to the claim of the plaintiffs. "Not only," says Lord TENTERDEN, "may the loss of goods become the subject of general contribution, but also, in some cases, the expense incurred in relation to them. Thus, where a ship went into port in distress, and wanting repairs, it became necessary to take out the cargo; and, there being no warehouses at hand, it was put on board other vessels: Lord STOWELL said, that, as the unloading of the goods was for the common benefit of all, it being necessary to unload the ship for the preservation of the cargo, as well as for its own repair, the expense incurred by it must be considered as general average." The cases the learned author cites for this position, are, *The Copenhagen* (2), *Da Costa v. Newnham* (3), and *The Gratitude* (4). On referring to *Da Costa v. Newnham*, I find it laid down, that, where a ship is obliged to put into port for the benefit of the whole concern, the charges of loading and unloading the cargo and taking care [of] it, and the wages and provisions of the workmen hired for the repairs, become general average. But it has since been determined otherwise. The learned author then goes on, "Thus, if it be necessary to unlade the goods, in order to repair the damage done to a ship by tempest, or by collision with another vessel, so as to enable her *to prosecute and complete her voyage, it has been held that the expense of unloading, warehousing, and re-shipping the goods should be sustained by general contribution, because all persons are interested in the execution of the measures necessary to the completion of the voyage." The reason there assigned might be applicable to the case the author had in his mind, *Plummer v. Wildman* (5); but, as a general proposition, it is too large; it would throw upon the shipper much of the expense which properly belongs to the ship-owner. In that case, there were undoubtedly some expressions of Lord ELLENBOROUGH which would seem to justify the passage: but,

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(1) See 14th ed. 763.

(2) 1 Rob. Adm. Rep. 289.

(3) 2 T. R. 407.

(4) 3 Rob. Adm. Rep. 257.

(5) 16 R. R. 334 (3 M. & S. 482).

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in the subsequent case of *Power v. Whitmore* (1), his Lordship explains that that decision proceeded upon the ground that the master "was compelled to cut away his rigging in order to preserve the ship, and afterwards put into port to repair that which he sacrificed." The expressions, therefore, in *Plummer v. Wildman* are repudiated and explained away. The result of these cases is thus summed up in Abbott on Shipping, p. 497, "It seems to result from these decisions, that, if a vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses of port-charges, wages, and provisions during the stay, are to be considered as general average; but, if the damage was incurred by the mere violence of the wind and weather, without sacrifice on the part of the owners for the benefit of all concerned, it falls, with the expenses consequent upon it, within the contract of the ship-owner, 'to keep his vessel tight, staunch, and strong,' during the voyage for which she is hired." In the following page, we find this passage: "We have seen, *in a former part of this work, that a master may, under certain circumstances, borrow money on the security of his ship, or of its cargo; and that, if his vessel is disabled by the perils of the sea from carrying her cargo to its destination, he may, if he think proper, hire another vessel for that purpose. But, supposing him to be unable to raise money on bottomry, or by hypothecation of the cargo, and that no other vessel can be obtained, he is at liberty to sell part of the goods intrusted to him, to enable him, by repairing his ship, to carry the remainder to their destination. Goods thus sacrificed for the benefit of the owners of the rest of the cargo, seem to have been considered by Lord STOWELL, in the case of *The Gratitude* (2), and have been considered in other cases, to be the proper subject of a general average. The motive of the sale, in the case supposed, is no other than the motive for jettison. It is the same thing to the merchant whose goods are taken from his control, whether they are sold or thrown into the sea. In either case, it is a sacrifice submitted to by him for the benefit of all, and which ought, therefore, to be made good by general contribution." It seems to me that the fair import of what Lord TENTERDEN lays down, is, to exclude from general average damage like this. Here, the ship had returned to port. There was no immediately impending peril. It is true that the cargo could not

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(1) 16 R. R. 416 (4 M. & S. 141).

(2) 3 Rob. Adm. Rep. 257.

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have been carried to its destination by the particular ship, unless she were repaired. We had recently a case in this Court, where it appeared that the vessel might have been sufficiently repaired so as to bring home about half her cargo, without absorbing the whole value of the ship and freight, when repaired, and it was held not to be a case of total loss (1). In the present case, *although it is stated that the cost of the repairs would exceed the value of the ship when repaired, it does not appear that they would have exceeded the value of the ship and freight. *Duncan v. Benson* (2) seems to me to go far towards deciding this case. There, the master of a ship damaged by perils of the seas, hypothecated at a foreign port, by one bottomry-bond, for necessary repairs, the ship, freight, and cargo, amongst which were the plaintiff's goods. The ship and freight realised less than the sum borrowed, and the plaintiff was obliged to contribute towards the difference, and also to pay his proportion of the costs of a suit instituted in the Court of Admiralty by the obligee of the bond : and it was held that the plaintiff might maintain an action against the owner of the ship, on an implied promise to indemnify. One cannot help thinking that the claim for general average, if well founded, would not have escaped the counsel who argued that case. At all events the COURT considered it; for, in giving judgment, POLLOCK, C. B., says : "The owner of the goods is under no obligation to contribute to any expenses except such as constitute a general average, and that of the repairs in this particular case does not fall under that description." The principle of that case applies very strongly here. When one considers how often ships have been hypothecated in foreign ports, in order to enable the master to bring them home, it is singular that it never should have been considered that bottomry interest could be made the subject of general average. I cannot think it could have been overlooked. I therefore think that the sale of part of the cargo under the circumstances stated upon this record, does not give any right to the owners to claim general average. Without, therefore, advert-
[*606] ing *to the special grounds of demurrer, I think the pleas are bad, and the declaration good ; and therefore the plaintiffs are entitled to our judgment.

CRESSWELL, J. :

I also am of opinion that the plaintiff is entitled to the judgment

(1) *Moss v. Smith*, ante, p. 307.

(2) 74 R. R. 754 (1 Ex. 537).

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of the Court upon this record. The first question arises upon the declaration. My brother *Channell* did not struggle much to show that the declaration did not disclose a good cause of action. It having been settled as a rule of law, that the master may under certain circumstances be justified by urgent necessity in selling a portion of the cargo, upon the terms of the owner's being paid the value of the part so sold at the port of discharge, I think the law implies a promise to the effect stated in this declaration. I also think that the two pleas demurred to, which are founded upon the claim to general average, are bad; no legal claim to average contribution arising upon the facts disclosed on this record. There has been no such loss as becomes the subject of general average. Damage done to the ship by stormy and tempestuous weather never yet has been held to be the subject of general average. The pleas adopt the description of the damage in the declaration. They then go on to say, that, in consequence of such damage, it became expedient and necessary for the vessel to put back to Adelaide. Could it be said at that time that there was an average loss? The only instance where this has been supposed to be so, prior to the case of *Plummer v. Wildman*, is, in the passage in Beawes's *Lex Mercatoria* (1), cited by BULLER, J., in *Da Costa v. Newnham*, where it is said that "the charges of unlading a ship, to get her into a river or port, ought not to be brought into general average, but when occasioned by an indispensable necessity to prevent the loss of ship and cargo; as, *when a ship is forced by a storm to enter a port to repair the damage she has suffered, if she cannot continue her voyage without an apparent risk of being lost; in which case the wages and victuals of the crew are brought into an average from the day it was resolved to seek a port to refit the vessel, to the day of her departure from it, with all the charges of unlading and relading, anchorage, pilotage, and every other due and expense occasioned by this necessity." But there was no authority in the English law, that I am aware of, until the case of *Plummer v. Wildman*, which undoubtedly does go to that extent. But Lord ELLENBOROUGH was in the next case that occurred anxious to protect himself from being thought to have intended to lay down the principle so largely: he qualifies and explains that case, in *Power v. Whitmore*, where he states the rule exactly according to what has always been, and still is, understood to be the law as to general average. And Lord TENTERDEN never meant to lay down

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(1) P. 245.

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the law larger than that. He refers, in Abbott, 8th ed. p. 475, to the Rhodian laws. "The rule of the Rhodian laws," he says, "is this: 'If goods are thrown overboard in order to lighten a ship, the loss, incurred for the sake of all, shall be made good by the contribution of all.' The goods must be thrown overboard; the mind and agency of man must be employed; if the goods are forced out of the ship by the violence of the waves, or are destroyed in the ship by lightning or tempest, the merchant alone must bear the loss. They must be thrown overboard to lighten the ship; if they are cast overboard by the wanton caprice of the crew or the passengers, they, or the master and owners for them, must make good the loss. The goods must be thrown overboard for the sake of all; not because the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the *fault of those who had shipped or received the goods; but because, at a moment of distress and danger, their weight, or their presence, prevents the extraordinary exertions required for the general safety. When the ship is in danger of perishing from the violent agitation of the wind, or from the quantity of water that may have forced a way into it, or is labouring on a rock, or a shallow, upon which it may have been driven by a tempest; or when a pirate or an enemy pursues, gains ground, and is ready to overtake; no measure that may facilitate the motion or passage of the ship can be really injurious to any one who is interested in the welfare of any part of the adventure, and every such measure may be beneficial to almost all. In such emergencies, therefore, when the mind of the brave is appalled, it is lawful to have recourse to every mode of preservation, and to cast out the goods in order to lighten the ship, for the sake of all. But, if the ship and the residue of the cargo be saved from the peril by the voluntary destruction or abandonment of part of the goods, equity requires that the safety of some should not be purchased at the expense of others, and therefore all must contribute to the loss." "From the rule thus established by the Rhodians, various corollaries have been deduced. Thus, if in the act of jettison, or in order to accomplish it, or in consequence of it, other goods in the ship are broken, damaged, or destroyed, the value of these also must be included in the general contribution. So, if, to avoid an impending danger, or to repair the damage occasioned by a storm, the ship be compelled to take refuge in a port to which it was not destined, and into which it cannot enter without taking out a part of her

cargo, and the part taken out to lighten the ship on this occasion happen to be lost in the barges employed to convey it to the shore, this loss also, being occasioned by the removal of the goods *for the general benefit, must be repaired by general contribution." That is, where part of the cargo is sacrificed for the purpose of lightening the ship, in order to get her into a port of safety. The learned author then speaks of the decision of Lord STOWELL, in the case of *The Gratitude*; and he goes on (1),—"Thus, if it be necessary to unlade the goods, in order to repair the damage done to a ship by tempest, or by collision with another vessel, so as to enable her to prosecute and complete her voyage, it has been held that the expense of unloading, warehousing, and re-shipping the goods should be sustained by general contribution, because all persons are interested in the execution of the measures necessary to the completion of the voyage." For this he refers, and evidently with an expression of doubt, to *Plummer v. Wildman*, which, as before observed, was afterwards explained by Lord ELLENBOROUGH himself. I never heard of general average of the nature disclosed by these pleas.

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WILLIAMS, J.:

I am of the same opinion. It is important to bear in mind the principle upon which general average is grounded; and that is, that it would be unjust that the goods of one should be sacrificed for the benefit of all, and that one alone should suffer for the common safety. These pleas do not by any means show that the copper in question was sold for the general benefit of all: their foundation, therefore, wholly fails.

TALFOURD, J., concurred.

Judgment for the plaintiffs.

LEWIS v. SMITH AND BROOKFIELD.

(9 C. B. 610—619; S. C. 19 L. J. C. P. 278.)

In consideration of A.'s having consented and agreed with B. to allow his (A.'s) name to be placed on the list of the provisional committee of a projected Railway Company, and to take certain shares therein, and to pay deposits thereon, B. undertook and promised "to indemnify A. from all personal responsibility, and to hold him harmless against all costs, charges, and expenses which then had been, or might thereafter be, incurred in and

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about the formation of the Company, their meetings, advertisements, surveys, and other expenses of carrying out the Company, applying for an Act of Parliament, or anything relating thereto." C., an advertising agent, afterwards unsuccessfully sued A. in the Exchequer, for moneys paid for the insertion of advertisements in divers newspapers at the request of the secretary of the Company: Held, that the extra costs incurred by A. in the defence of that action were not costs, charges, and expenses incurred in and about the formation of the Company, within the meaning of the indemnity.

THIS was an action of assumpsit. The declaration stated, that, before and at the time of the making of the promise thereafter mentioned, of the defendants and William Witham, and in the lifetime of the said William Witham, and before the commencement of this action, a certain Company was in the course of formation, that is to say, a Company or association of persons called and known by the name of "The Central Kent Railway Company," and thereupon, before the commencement of this suit, to wit, on the 19th of October, 1845, in consideration that the plaintiff, at the request of the defendants and of the said William Witham, had, to wit, then consented and agreed with the defendants and the said William Witham to allow his, the plaintiff's, name to be placed on the list of the provisional committee of the said Company, and also then agreed with the defendants and the said William Witham to take divers, to wit, fifty shares in the said Company, and to pay the deposits on the said shares, subject to any arrangement to be thereafter made respecting the application of that and other deposits, upon the terms and understanding of the defendants' and the said William Witham's then undertaking, and promising him, the plaintiff, to indemnify him, the *plaintiff, from all personal responsibility, and to hold him, the plaintiff, harmless from and against all costs, charges, and expenses that then had been, or might thereafter be, incurred in and about the said formation of the said Company, their meetings, advertisements, surveys, and other expenses of carrying out the said Company, applying for an Act of Parliament, or anything relating thereto, they, the defendants and the said William Witham, then undertook, and promised the plaintiff, to indemnify him, the plaintiff, from all personal responsibility, and to hold him, the plaintiff, harmless against all costs, charges, and expenses which then had been, or might thereafter be, incurred in and about the said formation of the said Company, their meetings, advertisements, surveys, and other expenses of carrying out the said Company, applying for an Act of Parliament, or anything relating thereto: that, by reason and in consequence of the

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said consent and agreement so made as aforesaid, the name of him, the plaintiff, was, to wit, on the day and year aforesaid, placed on the list of the provisional committee of the said Company; and that divers, to wit, ten thousand, advertisements of and relating to the said Company had been published, made, and inserted in divers newspapers and otherwise, on divers days and times before the making of the said promise of the defendants and the said William Witham; and that divers, to wit, ten thousand, other advertisements of and relating to the said Company had been published, made, and inserted in divers newspapers and otherwise, on divers days and times after the making of the said promise, and before the commencing the suit thereafter mentioned, to wit, of one George Reynell; and that the said several advertisements had been and were so published, made, and inserted by the said George Reynell, and had been and were so published, made, and inserted in and about the formation of the said Company; and that the costs and charges of the said George Reynell for and on account of the said advertisements so published, made, and inserted, amounted to a large sum, to wit, 700*l.*; and the same costs and charges were incurred in and about the said formation of the said Company, and the carrying out the same Company; and that, thereupon, the said costs and charges remaining and being unpaid, the said George Reynell, after the making of the said promise, and after the said advertisements had been so published, made, and inserted as aforesaid, to wit, on the 16th of March, 1846, commenced and prosecuted a certain action in her Majesty's Court of Exchequer of Pleas at Westminster, in the county of Middlesex, to wit, an action of debt, against the plaintiff, to recover against and from the plaintiff the said costs and charges of him the said George Reynell; and that the said action was commenced and prosecuted against the now plaintiff as aforesaid, for and by reason and in consequence of his, the plaintiff's, having consented and agreed to allow his, the plaintiff's, name to be placed on the list of the provisional committee of the said Company as aforesaid, and of his said name being so placed as aforesaid; and that, although the defendants and the said William Witham, to wit, on the day and year last aforesaid, had notice of the premises, the defendants and the said William Witham, not regarding their said promise, did not nor would hold the plaintiff harmless from and against the said costs and charges so incurred as aforesaid; and that, by reason and in consequence thereof, the plaintiff was obliged to expend, and did expend, to wit,

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on the day and year last aforesaid, and on divers other days and times between that day and the commencement of this suit, divers sums of money, amounting in the whole to *a large sum, to wit, 2,000*l.*, in and about the said action, and in and about the defence of him, the plaintiff, thereto, and in and about the prosecution of a suit in her Majesty's High Court of Chancery against the said George Reynell, William Henry Smith, William Witham, and Charles Austin Brookfield, rendered necessary and expedient by and by reason of the said action of the said George Reynell, which said sum, so expended as aforesaid, still remained wholly lost to the plaintiff; and was also, on the said days and times, forced to become liable, and did become and still remained liable, to pay divers other sums of money, amounting in the whole to a further large sum, to wit, 2,000*l.*, in and about and in relation to the said action and suit: And, for assigning a further breach of the said promise of the defendants and the said William Witham, the plaintiff said, that, although he, the plaintiff, was, before the commencement of this suit, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the commencement of this suit, obliged to expend, and did expend, divers sums of money, amounting in the whole to a large sum, to wit, 2,000*l.*, in and about the said action, and in and about the defence of him, the plaintiff, thereto, and in and about the said suit, and the prosecution thereof, of all which premises the defendants and the said William Witham in his life-time, to wit, on the 1st of March, 1848, had notice; yet the defendants and the said William Witham, further disregarding their said promise, did not nor would indemnify him, the plaintiff, from all personal responsibility from and against the said costs and charges so incurred as aforesaid, but neglected so to do, and, by reason and in consequence thereof, the plaintiff had lost and been deprived of the said sums so expended as aforesaid: To the damage, &c.

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Special demurrer, assigning for causes, amongst *others, that the consideration for the promise in the declaration mentioned, is so stated as to render it doubtful whether the same were executed or executory; that the said consideration is stated to have been an executed, and not an executory consideration, and yet it does not appear that the same had been so executed at the request of the defendants and the said William Witham; that the consideration stated is insufficient in law to support the promise alleged, inasmuch as the plaintiff's having agreed to allow his name to be placed on

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the provisional committee, and to take shares in the said Company as therein alleged, can form no sufficient consideration for a promise to hold the plaintiff harmless from and against all costs, charges, and expenses which had been or might be thereafter incurred in or about the formation of the said Company, their meetings, advertisements, surveys, and other expenses of carrying out the said Company, applying for an Act of Parliament, or anything relating thereto; that it is not stated or alleged, nor doth it appear by the said declaration, that the plaintiff ever allowed his name to be placed on the list of the provisional committee of the said Company; that the recital of the plaintiff's having consented and agreed to allow his name to be so placed on the said list, is insufficient in that behalf, and that such allowance ought to have been positively and directly averred, with certainty of time, and other particularity; that it is consistent with the said declaration, that his name was so placed on the said list adversely to, and without the licence, consent, or allowance of the plaintiff; that it is not stated or alleged, nor doth it appear, that the plaintiff ever took shares in the said Company, or paid the deposit thereon; that it is not stated or alleged, nor doth it appear with sufficient or any certainty, that the said advertisements were reasonable, proper, or necessary advertisements, or that the same were inserted by the said Company, or any person connected therewith, or otherwise within the terms of the said promise; that, as regards such as had been inserted before the making of the said promise of the defendants and the said William Witham, the declaration discloses no liability in the plaintiff to pay for the same, or in the defendants to indemnify him from the costs of the action in respect thereof; that it does not appear that the plaintiff, the Company, or any other person connected therewith, ever incurred any responsibility in respect of the said advertisements; that it is not stated or alleged, nor doth it appear that the said George Reynell ever had any cause of action against the plaintiff in respect thereof; that, the promise of the defendants being merely to indemnify the plaintiff from personal responsibility, and to hold him harmless from and against costs, charges, and expenses incurred in or about the formation of the Company, their meetings, advertisements, surveys, and other expenses of carrying out the said Company, applying for an Act of Parliament, or anything relating thereto, the same does not extend to the costs, charges, and expenses in the said breaches in the declaration mentioned; that the allegation that the action was

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commenced and prosecuted against the plaintiff for and by reason and in consequence of his having consented and agreed to allow his name to be placed on the lists of the provisional committee as aforesaid, is unintelligible and absurd, it being nowhere stated in the declaration that he had consented or agreed; and that, even if he had done so, still the same would not have rendered him liable to the said action, or been any legal reason or ground for the bringing of the said action against the plaintiff; that the costs of the said action and suit, or the defence of him, the plaintiff, are not within the terms of the said promise; that the said promise of the defendants must receive a reasonable construction, and cannot extend to all such costs, charges, and expenses as the plaintiff or *any other person may wantonly or maliciously incur in advertisements, or defending actions, or bringing suits, and yet the declaration discloses nothing to show that the said advertisements, action, and suit, costs, and charges were not so incurred.

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The plaintiff joined in demurrer.

Crompton, in support of the demurrer :

The indemnity declared upon is applicable only to claims rightfully made against the plaintiff, and does not extend to any actions which might be wrongfully brought, for which the law already provides a sufficient remedy. [He cited Comyns's Digest, Condition (I), Sheppard's Touchstone, p. 390, Notes to *Wotton v. Hele* (1); *Foster v. Mapes* (2); *Chaplain v. Southgate* (3); Cruise Dig. Deed, c. 24, § 55; and *Nash v. Palmer* (4).] Here, the plaintiff has not incurred any responsibility for or in respect of any costs and expenses incurred in and about the formation of the Company, or relating thereto, in the words of this covenant.

[618]

(CRESSWELL, J.: He has not been made personally liable to any such thing: Reynell tried to impose such a liability upon him, but did not succeed.)

The declaration does not show that the plaintiff ever took any shares in the railway.

(CRESSWELL, J.: Was not the agreement to do so enough for this purpose?)

Scarcely.

(1) 2 Wms. Saund. 177 a (8) and (c).
(2) Cro. Eliz. 212.

(3) 10 Mod. 384.
(4) 17 R. R. 364 (5 M. & S. 374).

Cowling (with whom was *Channell*, Serjt.), *contra* :

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The question is, what was the meaning of the parties, and what the extent of the indemnity intended? The defendant undertakes to indemnify the plaintiff from all personal responsibility, and "to hold him harmless" from and against all costs, &c., that then had been, or might thereafter be incurred in and about the formation of the Company, &c. The words are larger than those of an ordinary covenant to indemnify. * * If Reynell had been named in this covenant, that case would have been in terms the same as this: and it is submitted that the omission of the name makes no substantial difference. [He cited *Fowle v. Welsh* (1).]

[619]

Crompton, in reply, was stopped by the COURT.

CRESSWELL, J. (2) :

I am of opinion that the covenant to indemnify in this case must be construed in the ordinary way,—to indemnify the plaintiff against lawful claims. Taking the language most strictly, it cannot apply to this demand. The defendants contract to indemnify the plaintiff "from all personal responsibility, and to hold him harmless from and against all costs, charges, and expenses that then had been or might thereafter be incurred in and about the said formation of the said Company, their meetings, advertisements, surveys, and other expenses of carrying out the said Company, applying for an Act of Parliament, or anything relating thereto," defining the particular class of costs the indemnity was intended to apply to. Costs incurred by means of Reynell's action clearly are not included in it. It refers to costs and expenses in relation to the proceedings in forming and establishing the Company. The declaration is bad in substance.

WILLIAMS, J., and TALFOURD, J., concurred.

Judgment for the defendants.

(1) 25 B. R. 291 (1 B. & C. 29).

(2) Wilde, Ch. J. was absent.

1850.
April 2^d.

LOMAS *v.* BRADSHAW.

(9 C. B. 620—624; S. C. 19 L. J. C. P. 273.)

[620]

In an action by the payee against the maker of a promissory note, it is no answer for the latter to plead that the only consideration for the giving of the note was money advanced to the maker out of the funds of a friendly loan society of which both maker and payee were members, and that the payee was suing as treasurer and trustee on behalf of the society.

THIS was an action of debt. The first count of the declaration alleged that the defendant, on the 30th of May, 1845, made his promissory note for 45*l.*, payable, three months after date, to the plaintiff or his order.

The defendant pleaded, thirdly, that, before and at the time of the making of the said promissory note, there was, and thence until the time of the commencement of this suit continued to be, and still was, a certain co-partnership of persons using, and known by, the name of "The Manchester Dog and Partridge Thirty Pound Money Society," the names of which persons, except those of the plaintiff and the defendant, were to the defendant unknown; and that, before and at the time of the making of the said promissory note, and thence until the commencement of this suit, the plaintiff and defendant were and still continued respectively members of and co-partners in the said co-partnership; that the said promissory note was so made by the defendant, for the purpose of securing the re-payment to the said co-partnership of a certain sum of money, to wit, 45*l.*, then advanced by the said co-partnership to the defendant from and out of the funds of the said co-partnership, for and to the use of the said co-partnership; that there never was any consideration or value for so as aforesaid making the said promissory note, except as aforesaid; and that the plaintiff had brought the present action against him, the defendant, and then sued him, the defendant, upon the said note, on behalf of and for the use and benefit of himself, the *plaintiff, and of him, the defendant, and the other members and co-partners of and in the said co-partnership. Verification.

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Fourthly, that, before and at the time of the making of the said promissory note as thereafter mentioned, there was, and thence until and at the commencement of this suit there continued to be, and still was, a certain co-partnership of persons using, and known by, the name of "The Manchester Dog and Partridge Thirty Pound Money Society," the names of which persons, except that of the defendant, were to the defendant unknown; that, before and at the

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time of the making of the said promissory note, as thereafter mentioned, he, the defendant, was a member of and co-partner in the said co-partnership, and the plaintiff was, before and at the last-mentioned time, the treasurer and trustee of the same co-partnership; that the defendant, as in the first count mentioned, made and delivered the said promissory note to the plaintiff, as treasurer and trustee as aforesaid, for securing the re-payment by the defendant to the said society, of a certain sum of money, to wit, the sum of 45*l.*, then advanced by the said co-partnership to the defendant, as such member as aforesaid, out of the funds of the said co-partnership, to be repaid by the defendant to the said co-partnership for and to the use of the said co-partnership; that he, the defendant, as in the declaration mentioned, made and delivered the said promissory note to the plaintiff, as such treasurer and trustee as aforesaid, for securing the re-payment by the defendant to the said society of a certain sum of money, to wit, the sum of 45*l.*, then advanced by the said co-partnership to the defendant as such member as aforesaid, out of the funds of the said co-partnership, for and to the use of the said co-partnership; that there never was any consideration or value *for the said making of the said note, except as aforesaid; and that, at the time of the commencement of this suit, the plaintiff held, and still continued to hold, the said note, as treasurer and trustee of and for the said co-partnership, and commenced this suit, and then sued thereon, as such trustee on behalf and for the benefit of the defendant and the other members of the said co-partnership.

Verification.

[*622]

Demurrer, and joinder.

Cowling, in support of the demurrer :

The pleas are bad. The grounds of defence here relied on are two,—first, a total absence of consideration for the giving of the note,—secondly, that, inasmuch as both the plaintiff and the defendant are interested in the funds of the partnership, the plaintiff is not in a situation to sue upon the note; being, in effect, both debtor and creditor. The first objection is clearly without foundation. It is perfectly consistent with the pleas, that the defendant received the whole 45*l.*; and the receipt of the money would be ample consideration for the note. To constitute a defence, the defendant should show that the failure of consideration was such, that, if this were money, instead of a promissory note, he

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could have recovered it back as money had and received to his use. [He cited *Stephens v. Wilkinson* (1) and *Jones v. Jones* (2).] The plaintiff's right to sue upon the note is in no degree affected by the relative position of the parties. [He cited *Sharp v. Warren* (3), *Jackson v. Stopherd* (4), and *Jones v. Woollam* (5).]

[624] *Crompton, contra :*

The pleas are good. There was clearly no consideration for the giving of the note, as between these parties, though there might have been as between the plaintiff and the other members of the society and the defendant.

WILDE, Ch. J. :

I am of opinion that neither of these pleas affords any defence to this action. The defendant, a member of the society, borrows out of a fund in which the whole are interested a certain sum of money for his own individual use, and gives a promissory note for the amount, payable to the plaintiff. I see no pretence for suggesting any want or failure of consideration, or any principle upon which the plaintiff is prevented from enforcing the security.

The rest of the COURT concurring,

Judgment for the plaintiff.

1850.

CANNAN AND GRIMLEY v. HARTLEY.

[634]

(9 C. B. 634—649 ; S. C. 19 L. J. C. P. 323 ; 14 Jur. 577.)

A. is tenant to B. of rooms, for a term of years. Upon the bankruptcy of B., A. sends the key of the rooms to the office of the official assignee, where it is left with a clerk, who is told that it is the key of the rooms which A. had occupied. A. immediately quits possession, and no further communication takes place. Held, not to amount to a surrender by act or operation of law (6).

ASSUMPSIT for six quarters' rent, accruing due to the plaintiffs, as assignees, on the 29th of September, 1849, on a demise of rooms,

(1) 2 B. & Ad. 320.

(2) 55 R. R. 521 (6 M. & W. 84).

(3) 6 Price, 131.

(4) 2 Cr. & M. 361.

(5) 5 B. & Ald. 769.

(6) A surrender by act and operation of law takes place when the tenant of a particular estate becomes party to an act having some other object than that of a surrender, but which object

cannot be effected whilst the particular estate continues. See the cases collected, Com. Dig. tit. Surrender I. ; 20 Vin. Abr. tit. Surrender F. G. In these cases the presumed surrender is also presumed to have preceded the act to which the tenant is party.

In some recent cases, the Courts, more and more unwilling to frustrate the intentions of the parties by a strict

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apartments, fixtures, chattels, and effects, by the bankrupt, for three years from the 25th of March, 1847, with a count on an account stated with the plaintiffs as assignees.

Plea, first, *non assumpsit*; secondly, to the first count, that after the plaintiffs became assignees, and before any part of the money in the first count became due, to wit, on &c., the defendant surrendered and yielded up to the plaintiffs as assignees the said rooms, apartments, fixtures, chattels, and effects, and the plaintiffs as assignees then accepted (1) of such surrender, and took possession of such rooms, &c., and from thence hitherto have had possession thereof: thirdly, to the first count, that after the making of the promise, and before any part of the moneys therein mentioned became due, to wit, on, &c., the defendant was evicted from the rooms, &c., by Erasmus (*sic*) Wilson, of whom Tanner before he became bankrupt, and the plaintiffs as assignees since his bankruptcy, held the rooms, &c. as tenants thereof, and the *defendant hath from thence hitherto continued so evicted; and that the said Erasmus Wilson, at the time he so evicted, had lawful title (2)

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[*636]

adherence to the Statute of Frauds, have gone beyond this, and have held that an act, the direct and the only operation of which is, to extinguish the particular estate, an act done *ipsissimo animo sursum reddendi*, and differing in nothing from an express verbal surrender except by its informality, may be treated as creating a surrender by act and operation of law—a construction tending to make the exception nearly co-extensive with the enactment, and recalling the times when—as was the fate of the Statute De Donis—an Act of Parliament might be repealed by judicial astuteness. An unqualified statement of this principle occurs in *Lynch v. Lynch*, (6 Irish Law Rep. 131), where BRADY, C. B. says: “A surrender by act and operation of law, I think, may properly be stated to be a surrender effected by the construction put by the Courts on the acts of the parties, in order to give to those acts, the effect substantially intended by them.”

(1) This allegation appears to be unnecessary, since without any assent, either expressed or implied, on the part of the surrenderee, the estate

vests in him by the mere act of the surrenderor, until actual dissent. See *Thompson v. Leach*, 2 Salk. 618, and the note (b) in the sixth edition. *Thompson v. Leach* is also reported 3 Lev. 284, Lord Holt, 665, Carthew, 211, 250, 2 Mod. 290, 1 Shower, 296, Freeman, 502, 2 Ventr. 198. In that case it had been at first held in C. P., contrary to the opinion of VENTRIS, J., that assent on the part of the surrenderee, was necessary for the purpose of vesting the interest in him. And in *Townson v. Tickell*, 3 B. & Ald. 31, the Court of King's Bench, not being aware that the judgment in *Thompson v. Leach* had been reversed, acted upon the authority of the original overruled decision. *Vide* 4 Man. & Ry. 189, n.

See also Co. Litt. 113 a, *Ib.* 114 b, *Ib.* 245 a, b, *Ib.* 337 n. 294, 2 Bing. N. C. 70, 2 Scott, 128, 2 Swanst. 365, 371, 6 B. & C. 112, 9 Dowl. & Ry. 136, 2 Nev. & M. 806, 3 Nev. & M. 775, n., 5 Nev. & M. 6, 2 Man. & G. 690, 691, 6 Man. & G. 456, n., 1 My. & K. 195, Freeman by Smirke, 503, n.

(2) In this plea it is not shown how Wilson's title to evict arose. The defect would not be cured by a

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to evict the defendant and the plaintiffs as assignees aforesaid.
Verification.

Replication to both the special pleas, *de injuriâ*.

At the trial before Maule, J. at the London sittings in last Term, the plaintiffs proved a demise by Tanner before his bankruptcy, to the defendant, for three years, from the 25th of March, 1847, at 52*l.* 10*s.* per annum, payable quarterly. Tanner became bankrupt on the 10th of March, 1848. The rent was paid by the defendant to the assignees up to the 25th of March, 1848.

In May, 1848, the defendant sent the key of the rooms to the office of the plaintiff Cannan, the official assignee; and it was delivered to a clerk there as the key of the demised premises, and was never returned. On the same day the defendant quitted the premises, placing a tin plate on the door giving information of his removal to another locality. No communication took place between the plaintiffs and the defendant until a little before Christmas, 1849, when payment was demanded of the six quarters' rent now sued for.

In support of the third plea, certain proceedings taken by William James Erasmus Wilson (1), on the 4th of October, 1848, against Tanner, to obtain possession of the premises so deserted by Tanner, there being no sufficient distress on the premises, were produced; and it was shown that at Christmas, 1848, one Elam entered under Wilson and paid rent to him.

[*637] It was conceded, that upon the first issue the verdict *must be for the plaintiff. Upon the second issue it was contended, on the part of the defendant, that there had been a surrender by operation of law; and upon the third issue, that he was discharged by an eviction by Wilson, the landlord paramount.

The learned Judge directed a verdict for the plaintiffs upon all the issues, reserving leave to the defendant to move to enter a nonsuit; but it was ultimately agreed that in case the Court should be of opinion that there was any evidence of an eviction or of a surrender proper to go to the jury, a verdict should be entered for the defendant.

In the same Term *Edwin James* moved for leave to enter a verdict for the defendant upon the two special pleas accordingly.

verdict; as a lawful title to evict might have been sufficiently proved by showing an entry warranted by a forfeiture incurred by the defendant himself.

(1) The variance in the name, remaining unamended, would appear to be fatal.

Upon the first point he cited *Dodd* and another v. *Acklom* (1), where A. and B., having demised a house to C. at a yearly rent payable quarterly, A.'s wife delivered the key to C.'s wife. C. entered and occupied. Before the first quarter's rent became due, C.'s wife delivered back the key to A., who accepted it. This was held to amount to a surrender by act and operation of law within the exception in the third section of the Statute of Frauds.

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There was evidence to go to the jury on the last issue.

WILDE, Ch. J. :

There is more doubt upon your second point ; but you may take your rule upon both.

Rule nisi.

Byles, Serjt., and *J. M. Cobbett*, now showed cause :

There was no evidence which could have been properly left to the jury in support of any of the pleas. The sending of the key to Cannan was no surrender of the term ; nor would it have amounted to a surrender even *if Cannan had been the sole lessee. But one co-lessor cannot accept a surrender ; at least he cannot by such acceptance, determine the whole interest of the lessee. Then there was no proof that the clerk to whom the key was delivered, was an agent to accept a surrender.

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The present application was founded upon *Dodd* and another v. *Acklom*, which is at variance with all the cases before mentioned. In *Mollett v. Brayne* (2) the tenant quitted the premises with the assent of the landlord. This was held by Lord ELLENBOROUGH, to be no surrender of the tenant's interest, though he held only from year to year, and no answer to an action for use and occupation ; and the COURT refused to grant a rule *nisi* for a new trial. So, here, the only act done by the tenant was, that he left the premises ; there was no proof that the landlord went in. In *Doe d. Huddleston v. Johnson* (3), A., tenant from year to year, after Michaelmas, gave notice to quit at Lady Day. The premises were relet to B. by auction, at which auction A. was a bidder. B. was not let into possession. Held, not a surrender by act and operation of law.

(MAULE, J. : That was a simple attempt to repeal the statute by setting up a surrender by parol. In *Dodd* and another v. *Acklom*,

(1) 64 B. R. 838 (6 Man. & G. 672 ;
7 Scott, N. R. 415).

(2) 11 B. R. 676 (2 Camp. 103).

(3) M'Cl. & Y. 141.

CANNAN the facts raised a strong presumption that the landlord had taken
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The tenant wished to get rid of the premises, and the landlord accepted the key.

(WILDE, Ch. J.: The tenant deprived himself of the power of taking possession.)

[*639] In *Lyon v. Reed* (1), the authorities were all carefully reviewed. Great doubt is there expressed as to the decision in *Thomas v. Cook* (2), and the cases founded upon it, including that of *Dodd* and another v. *Acklom*; from which last case I hope, however, satisfactorily to distinguish the present. That *case, as to one important point, is more fully reported in 7 Scott, N. R. 415. From that report it appears, that in consequence of the rent due to the superior landlord being considerably in arrear, that person had threatened to take proceedings before a magistrate for the recovery of the possession under 3 & 4 Vict. c. 84, s. 13, and had warned the defendant not to bring his goods there; and that the learned Judge had told the jury, that the plaintiff was entitled to recover unless the defendant had made out to their satisfaction, that he was, by the act of the plaintiff, prevented from having a beneficial occupation of the premises (3), or unless the agreement had, by the consent of all parties, been put an end to before any rent became due.

In *Lyon v. Reed* (1) the Court of Exchequer appears to have considered that a demise by the reversioner to a stranger with the assent of the owner of the particular estate, does not amount to a surrender by act and operation of law. In the elaborate judgment pronounced in that case by PARKE, B., after referring generally to the old authorities, his Lordship says: "But in all these cases it is to be observed, the owner of the particular estate, by granting or accepting an estate or interest, is a party to the act which operates as a surrender. That he agrees to an act done by the reversioner, is not sufficient. Brooke, in his Abridgment, tit. Surrender, pl. 48(4),

(1) 67 R. R. 593 (13 M. & W. 285).

(2) 20 R. R. 374 (2 B. & Ald. 119).

(3) This point would naturally have great weight with the jury; but, as it does not appear to have been noticed either during or after the argument, it cannot affect the decision as an authority upon the point on which the

judgment proceeded.

(4) The *placitum* runs thus, "FROWIKE, Chief Justice: si mon termor agree que jeo fera feoffement a un estraunger, ceo est un surrender. Et il dit que cet case est adjudge en nostre livers—Quære ubi; quia credo quod non est lex (21 Hen. VII. 7)."

questions the doctrine of FROWIKE, Ch. J., who says (1): *‘If a termor agrees that the reversioner shall make a feoffment to a stranger, this is a surrender;’ and says he believes it is not law. And the contrary was expressly decided in the case of *Swift v. Heath* (2), where it was held (3), that the consent of the tenant for life to the remainderman making a feoffment to a stranger, did not amount to a surrender of the estate for life. And to the same effect are the authorities in Viner’s Abridgment (4), Surrender, F. 3 and 4 (5). . . . ‘Before the Statute of Frauds, the tenant in possession of a corporeal hereditament, might surrender his term by parol; and, therefore, the circumstance of his delivering up his lease to the lessor, might afford strong evidence of a surrender in fact; but certainly could not, on the principle to be gathered from the authorities, amount to a surrender by operation of law, which does not depend upon intention at all.’ With respect to the first case in which it was suggested that there could be a surrender by a demise made to a stranger with the assent of the lessee, *Stone v. Whiting* (6), it is observed, that although HOLROYD, J., intimated an opinion to that effect, there was no decision. After stating the decision in *Thomas v. Cook* (7), the judgment proceeds thus: ‘It is a matter of great regret that a case involving a question of so much importance and nicety, should have been decided by refusing a motion for a new trial. Had the case been put into a train for more solemn argument, we cannot but think that many considerations might have been suggested, which would have led the Court to pause before they came to the decision at *which they arrived. Mr. Justice BAYLEY, in his judgment, says the jury were right in finding that the original tenant assented, because, he says, it was clearly for his benefit; an observation which forcibly shows the uncertainty which the doctrine is calculated to create.’ The cases have again been reviewed in a third edition of Smith’s Leading Cases (8), in which the learned editors (9) point out the difficulties attending the construction now contended for. The point is still one of importance; for though by 8 & 9 Vict. c. 106,

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(1) This was said by FROWIKE, by way of illustration, in answering a question upon a totally different point, upon which *Fazley*, Serjt., had requested the opinion of the Court.

(2) Carthew, 110.

(3) So decided upon a special verdict.

(4) Vol. 20, p. 128, translated from 2 Roll. Abr. p. 495.

(5) The cases in these particular *placita*, appear to have turned upon an apparent intention not to surrender.

(6) 19 B. R. 710 (2 Stark. N. P. C. 236).

(7) 20 B. R. 374 (2 B. & Ald. 119).

(8) Vol. ii. p. 459.

(9) Keating and Willes.

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s. 8, a surrender in writing of any interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might have been created without writing, is void, unless made by deed, the enactment leaves surrenders by act or operation of law, as they stood before. There is not any evidence that the assignees ever entered, as alleged in the plea. The evidence is just the other way; for the official assignee sent to demand the rent. *Nickells v. Atherstone* is a mere reiteration of *Thomas v. Cook*. Supposing that what took place in this case would have amounted to a surrender in the case of a sole reversioner, here we have two reversioners, Cannan, the official, and Grimley, the trade assignee. It is difficult to say what estate they took; as joint tenants must come in at the same time, and by one and the same title (1). Assuming that these assignees were joint tenants, one alone could not accept a surrender. One joint tenant can do an act which is clearly for the benefit of the joint estate, but he cannot bind his companion by anything detrimental to the estate.

[*642] (MAULE, J.: A surrender to one *joint tenant operates only upon his estate.)

Here, the official assignee, the supposed surrenderee, was tenant in common with the trade assignee. In *Right v. Cuthell* (2) it was held, that a notice to quit signed by two out of three trustees to whom the lessee had assigned the term, was bad, even though given in the name of the three, and afterwards assented to by the third (3).

(MAULE, J.: When a surrender is made to one of two lessors, would the lessor not accepting the surrender, become tenant in common with the lessee?)

He would (4); and in that case the rent would have to be

(1) The estate of the assignees of a bankrupt is a special estate, a creation of the statutes relating to bankrupts. It has not all the incidents either of a common law joint tenancy or of a common law tenancy in common.

(2) 7 R. R. 752 (5 East, 491; 2 Marsh. 83; 5 Esp. N. P. C. 149). In that case the agreement under which the notice was given, required that it should be under the hand or hands of the lessee, his executors, administrators, or assigns.

(3) These trustees were, at law, merely joint tenants, with all the

incidents of a joint tenancy. They were not statutory assignees invested with a special character.

(4) A. and B., seised in fee, jointly demise to C. for a term. C. surrenders to A., who alone accepts the surrender. The immediate right of possession is now in A. and C., as tenants in common; A. being seised of his moiety as tenant in fee in possession, C. being possessed of his moiety as tenant for years under B., who is seised in fee of that moiety, subject to the possessory interest of C.

apportioned. But the surrender is not so pleaded. The second plea states a surrender not of a moiety, but of the whole.

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It was not proved that the landlord had entered in this case. The evidence is the other way; for the official assignee demanded the rent; whereas, in *Dodd* and another v. *Acklom* there was some evidence that the landlord had entered. *Nickells* v. *Atherstone* is merely a repetition of *Thomas* v. *Cook*.

Supposing the acts of the parties to be such as would justify the finding of a surrender in the case of a sole lessor, this case is different. There may be some difficulty in stating what the interest of the plaintiffs is. The titles of joint tenants must commence at the same time; but that is not the case with respect to official *and trade assignees. One joint tenant may do an act for the benefit, but not an act to the detriment of the joint estate. As a surrender to one joint tenant operates only upon his estate, the surrenderee would in such case become tenant in common with the surrenderor: *Rudde* (or *Rud*) v. *Tucker* (1).

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(MAULE, J.: That was a case of a surrender by one of two joint lessees; here, the surrender is to one of two reversioners.)

In *Right* d. *Fisher* v. *Cuthell* (2) it was held, that a notice given by two out of three joint devisees of the lessor was insufficient. It is true that there the proviso in the lease for twenty-one years, giving power to determine it at the end of fourteen years, required the notice by landlord or tenant, or their respective heirs, executors, &c., should be "in writing under his or their respective hand or hands;" but the principle upon which the judgment proceeds is not confined to the particular circumstance of the case.

(MAULE, J.: In the case of a surrender to one of two lessors, will the lessor not accepting the surrender become tenant in common with the lessee?)

(1) Cro. Eliz. 737, 802; S. C. per nom. *Tooker's* case, 2 Co. Rep. 62, the names being locally *idem sonantia*.

(2) 7 B. R. 752 (5 East, 491). And see S. C. 5 Esp. N. P. C. 149; 2 J. P. Smith, 83. In the latter report it is said that the words "under their respective hand or hands," were not in the plaintiff's brief. It is more likely that they were omitted there for brevity or by carelessness, than

that they were interpolated in the defendant's brief, and then argued upon as if they had been in both.

In a lease at will, if there be two lessors and one lessee, or one lessor and two lessees, the discontinuance of the will, on the part of any one of the three parties, would put an end to the tenancy. So it would be in the case of a demise at will *de anno in annum*; the tenancy, though classed among

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He would (1). The party *setting up the act must show that it was for the benefit of the estate: *Rud v. Tucker*. Supposing the surrender to be good, its greatest effect would be, not to extinguish the rent, but to make it apportionable. Here, the plea is, not of a surrender of a moiety, but of a surrender of the whole.

The clerk is not shown to have had any authority to receive the key.

(WILDE, Ch. J.: I suppose that is meant to be inferred from the circumstance of the key being retained.

MAULE, J.: In Co. Litt. 192 a, it is said, "If such a lessee (speaking of a lessee under a lease from two joint tenants) for life should surrender to one of them, it shall enure to them both; for they that have a joint reversion" (2).)

No doubt that is so if the other consents (3).

(MAULE, J.: So again in Co. Litt. 214, "a surrender to one joint tenant shall enure to both.")

With respect to the issue on the alleged eviction, the facts do not support the plea. These facts do not occur till after some part of the rent sued for had become due. The words of the plea, "before any part of the rent became due" are material, and the dates of the transaction disprove that allegation.

(James: I admit that this plea can go only to half a year's rent.)

The plea is pleaded to the whole demand.

(MAULE, J.: Cannot this issue be found distributively?)

estates for terms of years, being substantially and in truth an interest to continue *quamdium ambabus partibus placuerit*—subject to a renunciation of the right to determine the will except at particular periods.

And see *Doe d. Whayman v. Chaplin*, 12 R. R. 615 (3 Taunt. 120).

(1) It would rather seem that the party to whom the surrender was made, and who had thus acquired the immediate right of possession, would become tenant in common with the surrenderor.

(2) The authority referred to by Lord Coke is not confined to cases where the lessors are joint-tenants; it extends to all persons making a joint demise for life. "If two men lease land for a term of life, reserving rent to one, both shall have the rent, because the lease is joint by them; and the law is the same, if the tenant surrender to one of them, the other shall enter." T. 5 Edw. IV. fo. 4, pl. 7.

(3) Not only the consent, but even the knowledge, of the co-lessor, appears to be immaterial. *Ante*, p. 479 (1).

The jury were bound to return a verdict affirming or negating the eviction alleged. They could not have found eviction as to some quarters and no eviction as to others. Suppose *the case of a plea of release instead of a plea of eviction.

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(MAULE, J. : That would be by deed, of which there would be *profert*.)

Then put the case of a plea of accord and satisfaction, which requires no deed.

(MAULE, J. : But it is an entire plea. Some pleas may be taken *distributive*, as for instance, the plea of set off (1). *James* admits that the verdict upon this issue must be against him, but says that the facts entitle the defendant to a reduction of damages.)

There was no proof that Erasmus Wilson was the superior landlord, and came in by title paramount. The notice was not given to the right party. It was served upon Tanner the bankrupt ; but at the time of that service he had ceased to be the owner of the term ; it had passed to his assignees. Again, it merely appears that Elam, who was in possession, had been put in by Wilson, and that he had paid rent to Wilson. Even if Wilson was the superior landlord, there was no proof that the plaintiffs came in by him.

James, in support of rule :

The Court cannot discharge this rule without overruling the case of *Dodd* and another v. *Acklom*. Here, as there, the key is delivered to one of the plaintiffs without anything being said by the receiver.

(MAULE, J. : There, the key was accepted *simpliciter*.)

Here, it is left as early as May, 1848, at the official office of one of the plaintiffs ; it is publicly stated where the defendant is gone, and the key is never sent back. A distinction is sought to be made on the ground that this is not an action for use and occupation, *but upon an agreement. That does not affect the validity of the

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(1) A plea of set-off, being in the nature of a cross action, may be taken *distributive* with respect to the several matters of set-off. It cannot be taken *distributive* with reference to the matters to which it is pleaded. If in an action upon a bill of exchange for

500*l.* and a promissory note for 200*l.*, the defendant pleads a set-off for 1,000*l.* in bar of the action generally, he cannot, upon proving a demand to the extent of 200*l.*, claim a verdict in respect of the promissory note.

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surrender. In Coote's "Landlord and Tenant" (1) the following definition is given of a surrender by act and operation of law: "A surrender in law is where the parties, without any express surrender, do an act so inconsistent with the subsisting relation of landlord and tenant, as to imply an intention that the lessor should be in the same situation as if an express surrender had been made" (2).

The cases relied on for the plaintiff are the same as those cited in *Dodd v. Acklom and another*, with the exception of *Lyon v. Reed*; and the authority of *Lyon v. Reed* is balanced by the late case of *Nickells v. Atherstone* (3). In *Thomas v. Cook*, there was the substitution of a new tenant; but that was merely evidence of the acceptance of the surrender, with reference to which acceptance it is immaterial whether there was a substitution of a new tenant or the key was locked away in a *drawer. So also, the fact as to the surrender being made to one of two lessors, is common to both cases. In *Dodd and another v. Acklom*, it was held that acceptance of a surrender by one of two joint-lessors, operated as an acceptance by both.

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(MAULE, J.: In that case it was not put on the ground that the surrender to one operated as a surrender to both, but that one acted for both.)

Sending for the rent shortly before Christmas could not have the effect of rebutting the inference to be drawn from the conduct of the official assignee in retaining the key.

(1) P. 393.

(2) This definition appears to be too large. It would include every informal act showing an intention to depart with the immediate right of possession. Thus, if the tenant were to bring the key and say, "I surrender the premises which I hold of you," the surrender would be void by the Statute of Frauds; but if he laid down the key and had the prudence to be silent, confining himself to some renunciatory gesture sufficient to satisfy the jury of the existence of a *sursumredditionary* intent, there would be, for the purpose of the cause in which the verdict was found, and to that extent only, a valid surrender by act and operation of law.

It is said (Coote, 395), that where a

second lease for years was made to commence on the death of J. S., it was holden to be no surrender of a former term, because J. S. might survive the term; but if J. S. should die within the term, then it would immediately operate as a surrender. The authority for this position is merely a loose note in 4 Leon. 30. Upon principle it would seem that the implied surrender would take effect irrespectively of the event, inasmuch as a recognition of the existence of a power of creating a lease to take effect immediately after the death of J. S., disaffirms the continuing existence of a lease, which may continue after the death of J. S. And see *Ive v. Sams*, Cro. Eliz. 521, 522.

(3) 74 R. R. 556 (10 Q. B. 944).

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The rule which has been obtained to enter a verdict for the defendant upon the second and third pleas, must be discharged. There was no evidence to go to the jury on the last plea. With respect to the second plea the facts are very simple. The defendant, upon finding himself in an inconvenient position in consequence of his immediate landlord having run away, is anxious to get rid of the premises. He leaves the key of the house at the office of Cannan the official assignee; but the only evidence of the acceptance of the key by Cannan is, that it was not sent back. (His Lordship then referred to the note in the third edition of Smith's Leading Cases, vol. ii. 395 b.) Nothing further occurs until Christmas, 1849, when a demand of rent is made. The question is, whether there was evidence of a surrender and acceptance (1) upon which a verdict for the defendant could *have been sustained, not whether there was a *scintilla* of evidence. I am of opinion that there was no evidence of a surrender and acceptance which could have been properly left to the jury, and that this rule must be discharged.

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MAULE, J. :

I am of the same opinion. It is not necessary to consider whether the observations of the Court of Exchequer, in *Lyon v. Reed*, or those of the Court of Queen's Bench, in *Nickells v. Atherstone*, upon the law as laid down by this Court in *Dodd and another v. Acklom*, are to be adopted. But assuming our decision in that case to have been right, it will not avail the defendant in this case, the circumstances being essentially different. In *Dodd and another v. Acklom*, the defendant had complained of the rent, &c., being in arrear. An interview taking place, the tenant gave back the key, and the landlord accepted it. The jury having found that this amounted to a surrender and acceptance, the COURT refused to disturb the verdict. In that case the jury ha[ve] before them the fact that the plaintiff had accepted the key. Here, there is nothing but the fact of the key being brought to a clerk of the official assignee. It is contended,

(1) Some confusion appears to have been created in this case by treating the acceptance of the surrender by the surrenderer, as an ingredient of the surrender itself; the surrender, if valid at all, being necessarily complete antecedently to any agreement or acquiescence on the part of the surrenderer, the effect of whose accept-

ance of the surrender would be merely to deprive him of the power of subsequently disagreeing to the surrender and of thereby rendering void *ab initio* that which, until disagreement, had created a complete, though defeasible, merger of the estate of the surrenderor. *Vide* 4 Man. & Ry. 190; 2 Man. & G. 701, n.; 3 Man. & G. 733, n.

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that he was bound to receive anything brought to the office for his master. That may be so; but it does not follow that this was an acceptance by the master. But it is said that the conduct of the official assignee in not returning the key amounted to an acceptance of it. I do not think that the official assignee was bound to seek out the tenant for the purpose of rendering back the key. In *Dodd and another v. Acklom*, it was held that Dodd had authority to act for both. That sufficiently distinguishes that case from the present; and if the jury had found a verdict establishing a surrender and acceptance, such verdict would have been found upon mere *negations, and not upon evidence of anything done by the parties.

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To support the third plea there was no evidence at all.

CRESSWELL, J. :

I am of the same opinion. The strongest case for the defendant is that of *Dodd and another v. Acklom*. The observations of my brother MAULE on the case clearly distinguishes [sic] it from the present (1).

TALFOURD, J. concurred.

Rule discharged.

(1) Another not unimportant difference between *Dodd and another v. Acklom* and the principal case, (adverted to in the argument *supra*, 482), is, that the former was an action for use and occupation, with a plea of *non assumpsit*. That action was brought to recover "a reasonable satisfaction for the use and occupation of the tenements held and enjoyed," in respect of a period during which, with the assent of the plaintiff, all occupation by the defendant had ceased. To negative an implied promise of payment resulting from such a state of things, no surrender, either *de facto* or by act and operation of law, appears to be necessary. Whether the particular estate still had a continuing legal existence or not, it is clear that there was no actual or constructive (*Pinerov v. Judson*, 31 R. R. 388, 6 Bing. 206, 3 Moo. & P. 497) possession: *Burn v. Phelps*, 18 R. R. 749 (1 Stark. N. P. C. 94); *Whitehead v. Clifford*, 15 R. R. 579 (5 Taunt. 518); *Edge v. Stafford*, 35 R. R. 746 (1 Cr. & J. 391).

In the principal case, the action was on the demise; the occupation was merely an incident; the question between the parties was, whether the legal existence of the particular estate had been determined by a valid surrender, an acceptance of such surrender having been assumed to be necessary to its validity.

As this distinction was not noticed in the argument or in the judgment in *Dodd and another v. Acklom*, it does not affect the decision in that case as an authority.

In *Creagh v. Blood*, 3 Jo. & Lat. 132, Sir EDWARD SUGDEN, C., expresses his disapprobation of the inroads which had been made upon the Statute of Frauds, with respect to surrenders. In that case his Lordship says: "When the Statute (of Frauds) speaks of surrender by act and operation of law, it certainly alludes to those surrenders where the party, whether by estoppel or otherwise, accepts an estate inconsistent with the estate which he has."

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(9 C. B. 661—689; S. C. 19 L. J. C. P. 345; 14 Jur. 1094.)

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The members, resident in England, of a Company formed for the purpose of carrying on business in a place out of England, are bound, in respect of the transactions of that Company, by the law of the country in which the business is carried on accordingly (2).

A statute authorising an unincorporated Company to sue and to be sued in the name of its chairman, constitutes the chairman, when so suing or so sued, an agent for the members of the Company in the affairs of the Company.

The members of a Company formed for the purpose of carrying on business in a colony, are not discharged from liability on judgments obtained in the colony against the chairman, by reason of their having been resident in England, not being served with process, and having received no notice of the proceedings.

Where a statute subjects the property of members for the time being of an unincorporated Company, to execution upon a judgment obtained against their chairman, reserving in other respects the liabilities of parties, the remedies given against the property are in cumulation, and a member may be proceeded against by action.

A judgment in a colonial Court is no estoppel; nor is it pleadable in bar in an action brought in England for the same cause.

ASSUMPSIT. The first count of the declaration stated, that whereas, before and at the several times thereafter, in that count mentioned, several persons had formed themselves into a Company, established *at Sydney, in parts beyond the seas, to wit, in her Majesty's colony of New South Wales, under the name, style, and firm of the Bank of Australia, for the purpose of carrying on at Sydney aforesaid the trade and business of bankers, to wit, for the purposes of discount and issuing notes and bills, and lending moneys on securities and cash accounts; for the receiving of moneys on deposit account for the safe custody of moneys and securities for moneys for the general public accommodation and benefit; and also for transacting and negotiating all such other measures and things as were usually done and performed relating to or connected with the ordinary business of banking, and the said Company were before and at the several times thereafter in that count mentioned, so carrying on at Sydney aforesaid the said trade and business of bankers: And whereas, after the said formation and establishment of the said Company, and whilst the same was carrying on the said trade and business, and before the

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(1) See the proceedings in the Queen's Bench, nom. *Bank of Australasia v. Nias* (1851) 16 Q. B. 717, 20 L. J. Q. B. 284. The case is cited in *Godard v. Gray* (1870) L. R. 6 Q. B. 139, 150, 40 L. J. Q. B. 62; *Copin v. Adamson* (1874) L. R. 9 Ex. 345, 350,

355, 43 L. J. Ex. 161 (affd. 1 E. Div. 17).—F. P.

(2) Rather widely stated, see *Riaden Iron and Locomotive Works v. Furness* [1906] 1 K. B. 49, 75 L. J. Q. B. 83.—F. P.

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bringing of such action as is therein mentioned, to wit, on the 28th day of August, 1833, a certain Act of the Governor and Legislative Council of New South Wales was made and passed relating to and concerning the said Company, to wit, an Act, intituled "An Act to enable the proprietors of a certain banking *establishment or Company carried on in the town of Sydney in the colony of New South Wales, under the name, style, and firm of the Bank of Australia, to sue and be sued in the name of the chairman of the said Bank or Company for the time being, and for the purposes therein mentioned," which Act was and is in the words and of the tenor following, that is to say: "Whereas several persons formed themselves in a Company or society established at Sydney, under the name, style, or firm of the Bank of Australia, as well for the purposes of discount and issuing of notes and bills, and lending moneys on securities and cash accounts; for the receiving of moneys on deposit accounts; for the safe custody of moneys and securities for moneys for the general public accommodation and benefit; and also for transacting and negotiating all such other matters and things as are usually done and performed relating to or connected with the ordinary business of banking: And whereas the said Bank is now carried on in Sydney, and is under the care and management and superintendence of eleven directors, one of whom is chairman of the said Bank: And whereas difficulties may arise in recovering debts due to the said Bank or Company, and in maintaining actions or proceedings for damages done to their property, and also in prosecuting persons who may steal or embezzle the bills, notes, bonds, mortgages, moneys, goods, chattels, or effects of the said Bank: And whereas it would be convenient and just that persons having demands against the said Bank should be entitled to sue some member thereof in place and stead of the whole: But as these purposes cannot be effected without the aid and authority of the Legislature, Be it therefore enacted, by his Excellency the Governor of New South Wales, with the advice of the Legislative Council, that from and after the passing of this Act, all actions and suits and all proceedings at law or in equity, to be commenced *and instituted, and prosecuted or carried on by or on behalf of the said Bank; or when the said Bank is or shall be in any way concerned, against any person or persons, body or bodies politic or corporate, or whether a member or members of the said Bank, or otherwise, shall and may be lawfully commenced, instituted, and prosecuted or carried on in the name of the person

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who shall be chairman of the said Bank at the time any such action, suit, or proceeding shall be commenced or instituted as the nominal plaintiff, complainant, or petitioner for and on behalf of the said Bank, and that all actions, suits, or proceedings aforesaid to be commenced, instituted, or prosecuted against the said Bank, shall be commenced, &c., against the chairman for the time being of the said Bank, as the nominal defendant for and on behalf of the said Bank, and that all prosecutions to be brought, instituted, or carried on, by or on behalf of the said Bank for fraud upon or against the said Bank, or for embezzlement, robbery, or stealing the bills, notes, bonds, moneys, goods, chattels, effects or property of the said Bank, or for any other offence against the said Bank, shall or may be so brought or instituted and carried on in the name of such chairman for the time being of the said Bank; and in all indictments and informations it shall be lawful to state the property of the said Bank to be the property of such chairman for the time being of such Bank; and any offence committed with intent to injure or defraud the said Bank shall and lawfully may, in any prosecution for the same, be stated or laid to have been committed with intent to injure or defraud such chairman for the time being of such Bank; and any offender or offenders may thereupon be lawfully convicted of any such offence; and in all other allegations or indictments, informations or other proceedings, it shall and may be lawful and sufficient from and after the passing of this *Act to state the name of such chairman; and the death, resignation, or removal, or other act of such chairman, shall not abate any such action, suit, or prosecution, but the same may be continued where it left off, and be prosecuted and carried on in the name of any person who may be or become chairman of the said Bank for the time being.

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“ And (1) that a memorial of the name of the chairman of the said Bank, in the form or to the effect for that purpose set forth in the schedule hereunto annexed, signed by the said chairman and by a majority of the directors of the said Bank, shall be recorded upon oath in the Supreme Court of New South Wales within thirty days after the passing of this Act; and when and as often as any director of the said Bank shall be newly elected chairman thereof, a memorial of the name of such newly-elected chairman, in the same form or to the same effect as the above-mentioned memorial, signed by such newly-elected chairman and a majority of persons who shall be directors of the said Bank at the time of the election of such new chairman,

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shall in like manner be recorded upon oath in the said Supreme Court within thirty days next after such chairman shall be elected.

"Provided always (1), and be it further enacted, that until such memorial as hereinbefore first mentioned, be recorded in the manner herein directed, no action, suit, or other proceeding shall be brought by the said Bank in the name of the chairman of the said Bank as aforesaid, under the authority of this Act."

"Provided always (2), that the chairman being the plaintiff, complainant, petitioner, or defendant in any such action, suit, petition, or other proceeding as aforesaid, on behalf of the said Bank, shall not prevent or *affect the competency of any such chairman so as to prevent him from being a witness in such action, &c., in the same manner as might have been if his name had not been made use of as such plaintiff, &c.

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"Provided always (3), that execution upon any decree or judgment in any such action, suit, &c., obtained against the chairman for the time being of the said Bank, whether he be plaintiff or defendant therein, may be issued against, and levied upon, the goods and chattels, lands, and tenements of any member or members whatsoever of the said Bank for the time being, in like manner and not otherwise than as if such decree or judgment had been obtained against such member or members personally. Provided always, that every such chairman in whose name every such action, &c., shall be commenced, prosecuted, carried on, or defended, and every such member or members against whose goods and chattels, lands and tenements, execution upon any judgment or decree shall be issued or levied as aforesaid, shall always be reimbursed and paid out of the funds of the said Bank, all such damages, dues, expenses, costs, and charges as by the event of any such proceeding such chairman or member or members shall or may be put unto or become chargeable with; and all such remedies shall be allowed as between the several members of the said Bank for the time being, as if this Act had not been passed.

"And (4) that the provisions in this Act contained shall extend and be construed, deemed, and taken to extend to the said Bank, at all times during the continuance of the same, whether the said Bank be now or hereafter composed of some, all, or any of the persons who were the original or are the present members thereof, or of all or some of those persons; together *with some other

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(1) Sect. 3.

(2) Sect. 4.

(3) Sect. 5.

(4) Sect. 6.

person or persons, or shall be composed altogether of persons who were not originally nor are the members of the same.

“Provided always (1), that nothing herein contained shall extend or be deemed, &c., to extend to incorporate the members of or proprietors of the said Bank, or to relieve or discharge them or any of them from any responsibility, duties, contracts, or obligations whatsoever which by law they now are, or at any time hereafter shall be, subject or liable to either between the said Bank and others, or between the individual members of the said Bank, or any of them and others, or among themselves, or in any other manner whatsoever, except so far as the same are affected by the provisions of this Act, and the true intent and meaning of the same.

“And (2) that all bonds, mortgages, warrants of attorney, and other securities not being assignable in the law, which have been, or which shall or may at any time hereafter be, taken in the name of any person as chairman of the said Bank for and on account of the said Bank, shall and may be put in suit and be sued upon at law or in equity, in the name of the chairman in whose name the same may have been taken, or in the name of any person who shall or may succeed to that office, and be the chairman of the said Bank at the time such proceeding or proceedings shall be instituted, notwithstanding the name of any such succeeding chairman be not inserted in such bond, &c. as an obligee, &c. of the sum or sums of money therein mentioned, and the death, resignation, removal, or other act of any such chairman of the said Bank for the time being in whose name any such bond, &c. shall so be put in suit, shall not abate any action, &c. had thereon; *but the same may be continued where it left off, and be prosecuted and carried on in the name of any person who may succeed to that office, and be or become the chairman of the said Bank for the time being; and the legal estate in all lands and tenements belonging or mortgaged to the said Bank and all legal rights and capacities, shall become vested in such new chairman as aforesaid to all intents and purposes, immediately upon the recording of the memorial of the name of such new chairman in the said Supreme Court, and so on *toties quoties* whensoever any new appointment or election of a chairman for the time being of the said Bank shall take place, and such new memorial thereof shall be inrolled as aforesaid.

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(1) Sect. 7.

(2) Sect. 8.

(3) Sect. 9.

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&c. by virtue of this Act, the plaintiff therein shall not be nonsuit, nor shall a verdict be given against the plaintiff, for want of proof of the record of such memorial or memorials as hereinbefore mentioned; but in case the defendant in any such action shall make it appear on such trial that no such memorial or memorials have been recorded, then a nonsuit shall be entered in such action.

“Provided always (1) that nothing in this Act contained shall be deemed to affect, or apply to, any right, title, or interest of his Majesty, his heirs, and successors, or of any body or bodies politic or corporate, or of any other person or persons excepting such as are mentioned therein, or of those claiming by or under him or them.

“And (2) that this Act shall not commence or take effect until the same shall have received the Royal approbation, and the notification of such approbation shall have been made by his Excellency the Governor in the *New South Wales Government Gazette*.

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“And (3) that when and as soon as this Act shall have received the Royal approbation, and notification of such approbation shall have been made as aforesaid by his Excellency the Governor, in the *New South Wales Government Gazette*, this Act shall be deemed and taken to be a public Act, and shall be judicially taken notice of as such by the Judges of the Supreme Court of New South Wales, and by all other Judges, justices, and others, within the colony of New South Wales and its dependencies, without being specially pleaded.”

Averment: That afterwards, and before the bringing of such action as hereinafter mentioned, to wit, on the 28th day of August, 1833, the said Act received the Royal approbation, and that the notification of such approbation was then made by the then Governor of New South Wales in the *New South Wales Government Gazette*; and that thereupon the said Act then became, and was, and from thence continually had been, and still was, the law of and in the said colony applicable to the said Company, and part and parcel of the law of the said colony; and that after the said Act had become, and whilst the same was such law and parcel of the law of the said colony as aforesaid, and before and at the respective times of the bringing of such action and of the recovery of such judgment as thereinafter respectively mentioned, one Thomas Chaplin Breillat was the chairman of the said Company,

(1) Sect. 10.

(2) Sect. 11.

(3) Sect 12.

and the defendant before and at the respective times last aforesaid, and also before and at the times of the making of such promises by the said Company, as thereafter in that count mentioned, was and from thence respectively, had been, and still was, a member of the said Company; and that whilst the said Thomas Chaplin Breillat was the chairman of the said Company as aforesaid, and whilst the defendant was a member of the said Company as aforesaid, to wit, on *the 7th day of December, A.D. 1844, they the plaintiffs caused the said Thomas Chaplin Breillat, as such chairman of the said Company, to be summoned, according to the course and practice of the Supreme Court of New South Wales, to appear as the nominal defendant for and on behalf of the said Company, in the said Court, pursuant to the provisions of the said Act, to answer the plaintiffs in an action on promises; and that afterwards, to wit, on the day and year last aforesaid, the said Thomas Chaplin Breillat having duly appeared in the said Court, according to the course and practice of the said Court, to such summons, the plaintiffs did thereupon then declare in the said action against the said Thomas Chaplin Breillat, as the chairman of the said Company, and as the nominal defendant for and on the behalf of the said Company, by virtue of the said Act; and that such proceedings were thereupon further had in the said Supreme Court of New South Wales, in the said action, that afterwards, and whilst the said Thomas Chaplin Breillat continued to be and was the chairman of the said Company, and whilst the defendant continued to be and was a member of the said Company, to wit, on the 8th day of September, A.D. 1845, the plaintiffs, by the consideration and judgment of the said Supreme Court, recovered against the said Thomas Chaplin Breillat, as the chairman of the said Company, as aforesaid, as well a certain sum of 175,708*l.* 18*s.* 7*d.*, for the damages which the plaintiffs had sustained by and on account of the non-performance of certain promises before that time made by the said Company to the plaintiffs, as also the sum of 2,404*l.* 2*s.* 0*d.* for their costs and charges by the same Court then adjudged to the plaintiffs, with their assent; which damages, costs, and charges in the whole amount to 178,108*l.* 0*s.* 7*d.*; whereof the said Thomas Chaplin Breillat, as the chairman of the said *Company, and as such nominal defendant as aforesaid, was convicted; and that the said promises were made, and the said plaintiffs' causes of action in respect thereof arose within the jurisdiction of the same

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Court, and that the same Court, during all the time whilst the said action was pending therein as aforesaid, and continually until and at the time of the giving of the said judgment, was, and was duly holden, within the jurisdiction thereof, in parts beyond the sea, to wit, at Sydney aforesaid, and that the said judgment was given by the said Supreme Court at a place within the jurisdiction of the same Court, to wit, at Sydney aforesaid, to wit, by the Chief Justice and other the justices of the said Supreme Court, to wit, by Alfred Stephen, Esq., Chief Justice, and John Nodes Dickinson, Esq., and William A'Beckett, Esq., justices of the same Court. And further that the said judgment still remains in full force and effect, and not in any wise satisfied, reversed, or annulled; and that no execution hath as yet been obtained of, or upon the said judgment; and that the damages, costs, and charges aforesaid, in form aforesaid adjudged to the plaintiffs, are of great value—to wit, of the value of 178,108*l.* 0*s.* 7*d.* By means of which several premises the defendant as and being such member of the said Company as aforesaid, then became, as such member of the said Company, liable to pay to the plaintiffs the last-mentioned sum of money, when he, the defendant, should be thereunto afterwards requested; and, being so liable, and the last-mentioned sum of money then being and remaining wholly due and unpaid, he, the defendant, then—to wit, on the day and year last aforesaid—in consideration of the premises, promised the plaintiffs to pay them the last-mentioned sum of money upon request. Breach, in non-payment.

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The second count stated, that whereas before the *30th day of October, 1848, in parts beyond the sea, to wit, at Sydney, in her Majesty's colony of New South Wales, the defendant made his promissory note in writing, bearing date the day and year last aforesaid, and thereby promised to pay the plaintiffs, on demand, 154,000*l.*, with interest for the same, to wit, interest at the rate of 8 per cent. per annum from the date thereof, such rate of interest then being the usual and customary rate of interest in that behalf, and the highest legal rate of interest, in the said colony; and then delivered the same to the plaintiff. Breach, in non-payment.

The declaration also contained a count for money lent, and a count upon an account stated.

Fourth plea, to the first count of the declaration: That the defendant was not a native of the said colony, or born at any place within the jurisdiction of the said Supreme Court, but, on

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the contrary thereof, was born out of the said colony, and out of the jurisdiction of the said Supreme Court, to wit, in England; and that the defendant was not before or at the respective times of the bringing of the said action, and the recovery of the said judgment, as in the first count mentioned, or at any time since, resident or domiciled in the said colony, or at any place within the jurisdiction of the said Supreme Court, and was not, in any manner, during the time last aforesaid, or any part thereof, bound by, or subject to the laws of the said colony; and that, although the said judgment was in fact recovered by the plaintiffs in the said Supreme Court as in the said first count of this declaration mentioned, he, the defendant, was not at any time summoned by any summons, or served with any process, issuing out of the said Supreme Court, at the suit of the plaintiffs for the causes of action upon which the said judgment was so recovered; nor had he, the defendant, any notice, or knowledge of any such summons, *or process, or of the proceedings in the said action; nor did he, the defendant, appear, nor had he any opportunity of appearing, in the said Court to answer the plaintiffs in the said action. Verification.

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Tenth plea, to the second, third, and fourth counts: That the plaintiffs ought not to be admitted or received to say that the defendant promised as in those counts, or any of them, alleged; because he says that the several promises in those counts respectively mentioned, were made by the defendant as a member of the Bank or Company in the said first count mentioned, and that the plaintiffs' said several causes of action in respect of the said several premises respectively, accrued to the plaintiffs from the defendant as such member of the said Bank or Company as aforesaid, and not otherwise; and that before and at the respective times of the making of the several last-mentioned promises by the defendant as such member of the said Bank or Company as aforesaid, and of the bringing of such action and the recovering of such judgment as hereinafter respectively mentioned, the said Bank or Company was established and carried on in parts beyond the seas, to wit, at Sydney, in her Majesty's colony of New South Wales, under and by virtue of the Act in the said first count mentioned, which Act, before and at the several times of the making of the last-mentioned promises by the defendant as such member of the said Bank or Company as last aforesaid, and of the bringing of such action and the recovering of such judgment as hereinafter respectively mentioned, was, and from thence respectively had

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been, and still was, part and parcel of the law of the said colony, applicable to the said Bank or Company; and that, before and at the respective times of the making of the respective promises by the defendant as such member of the said Bank or Company as last aforesaid, and of the bringing of such action and the recovering of *such judgment as hereinafter respectively mentioned, by the law of the colony, a judgment recovered in the Supreme Court of the said colony by any person or persons, or any body or bodies politic or corporate, having any demands upon the said Bank or Company, against the chairman of the said Bank or Company for the time being, as the nominal defendant for and on behalf of the said Bank or Company, pursuant to the provisions of the said Act, from thence respectively had been, and still was, an absolute and fixed bar and preclusion to and against any other action or suit for the same demand against any individual member of the said Bank or Company: and that, after the making of the said last-mentioned promise as aforesaid by the defendant as such member as aforesaid, and before and at the respective times of the bringing of such action and the recovery of the said judgment as herein-after respectively mentioned, one Thomas Chaplin Breillat was the chairman of the said Bank or Company liable to be sued as the nominal defendant for and on behalf of the said Bank or Company by virtue of the said Act; and that, after the making of the several last-mentioned promises by the defendant as such member of the said Bank or Company as aforesaid, and before the commencement of this suit, to wit, on the 7th day of September, 1844, the plaintiffs caused the said Thomas Chaplin Breillat, as such chairman of the said Bank or Company as aforesaid, to be summoned according to the course and practice of the Supreme Court of New South Wales, to appear as the nominal defendant for and on behalf of the said Bank or Company in the said Court, pursuant to the provisions of the said Act, to answer the plaintiffs in an action on promises; and that afterwards, to wit, on the day and year last aforesaid, the said Thomas Chaplin Breillat, having duly appeared in the said Court, according to the course and practice of the said

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*Court, to the summons, the plaintiffs did thereupon then declare against the said Thomas Chaplin Breillat as the chairman of the said Bank or Company, and as the nominal defendant for and on behalf of the said Bank or Company by virtue of the said Act: and that such proceedings were thereupon further had in the said Supreme Court in the said action, that afterwards, and whilst the

said Thomas Chaplin Breillat continued to be, and was, chairman of the said Bank or Company, and before the commencement of this suit, to wit, on the 8th September, 1845, the plaintiffs, by the consideration and judgment of the said Supreme Court, recovered against the said Thomas Chaplin Breillat as such chairman of the said Bank or Company as aforesaid, as well a certain sum of 175,708*l.* 18*s.* 7*d.*, for the damages which the plaintiffs had sustained on occasion of the non-performance of certain promises before that time made by the said Bank or Company to the plaintiffs, as also the sum of 2,404*l.* 2*s.* 0*d.* for their costs and charges by the said Supreme Court then adjudged to the plaintiffs with their assent; which damages, costs, and charges, in the whole amount to 178,108*l.* 0*s.* 7*d.*; whereof the said Thomas Chaplin Breillat, as such nominal defendant as aforesaid, was convicted; as by the proceedings of the Court, reference being thereunto had, will amongst other things more fully and at large appear; and that the last-mentioned promises were made, and the plaintiffs' causes of action in respect thereof arose, within the jurisdiction of the said Supreme Court of New South Wales; and that the said Court, during all the time whilst the said action was depending therein as aforesaid, and continually until and at the time of the giving of the said judgment, was duly holden within the jurisdiction thereof, in parts beyond the seas, to wit, at Sydney, in the said colony of New South Wales; and that the said judgment was given by the said Court at a place *within the jurisdiction of the said Court, to wit, at Sydney aforesaid, to wit, by the Chief Justice, and other the justices, &c. of the Court, to wit, &c., by, &c.; which judgment still remains, and is in full force and effect, and not in any wise reversed, vacated, or made void; and that the several promises and causes of action in the said second, third, and last counts of this action respectively mentioned, are the same identical promises and causes of action for, upon, and in respect of which the plaintiffs brought the said action and recovered the said judgment in the said Supreme Court of New South Wales, against the said Thomas Chaplin Breillat, as the chairman of the said Bank or Company, and as such nominal defendant as aforesaid; and that, by the law of the colony, the judgment so recovered against the said Thomas Chaplin Breillat, as the chairman of the said Bank or Company, and as such nominal defendant for and on behalf of the said Bank or Company, as in that plea is mentioned, was final and conclusive in the said colony against the said Thomas Chaplin

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Breillat as such nominal defendant as aforesaid, and was an absolute and final bar and preclusion to and against any action or suit against the defendant as a member of the said Bank or Company, for or in respect of the said promises and causes of action in the said second, third, and last counts respectively mentioned, or any of them. Verification: wherefore the defendant prays judgment, if the plaintiffs ought to be admitted or received, against the judgment so recovered by them as aforesaid, to say that the defendant promised as in the said second, third, and last counts, or in any of them, is alleged.

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Upon the fourth plea, the issue taken was, that the defendant was at the several times of the bringing of the said action and of the recovery of the said judgment, bound by, and subject to, the laws of the said colony, to wit, as and being at the several times last aforesaid a member of the said Bank or Company.

To the tenth plea the plaintiffs demurred, showing for cause of demurrer, that the said plea does not allege or disclose any matter of estoppel, and ought not to be pleaded by way of estoppel, and is improperly commenced and concluded as a plea of estoppel, and has not a proper formal commencement or conclusion, and does not pray a proper judgment; and also for that the said last plea is ambiguous, and has a double aspect, in this, to wit, that it proposes to show that the said causes of action are merged in the judgment in that plea mentioned, and also assumes to set up such judgment as an estoppel to the plaintiff's recovery in respect of the promise as to which the said plea is pleaded; and also for that the said plea ought to have been pleaded as an ordinary plea in bar, inasmuch as the supposed defence therein contained, purposes to be, that the causes of action as to which the said plea is pleaded, were merged in the said judgment; and for that it does not appear how or why the said judgment should be an absolute and final bar and preclusion to and against any action or suit by the plaintiffs against the defendant, as a member of the said Bank; and that if the said plea discloses any matter of defence at all, such matter of defence is improperly pleaded, and has not the legal operation and effect attempted to be given to it by the said plea; and for that the said plea is inconsistent and repugnant, inasmuch as it avers that the plaintiffs ought not to be admitted or received to say that the defendant promised as in the said second, third, and last counts or any of them mentioned, whilst the said plea in the body of it conclusively shows that the defendant, as a member of the said Bank of Australia, did so

promise, and that judgment was recovered upon *and in respect of such promises of the defendant, and the non-performance thereof (1).

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Channell, Serjt. (with whom were *Gaselee*, Serjt., *Hugh Hill*, and *Welch*) for the plaintiffs :

As the defendant has stated that he means to object to the declaration, it will be convenient to begin with the first count, to which the objection applies. That count sets out a judgment recovered in the Supreme Court of New South Wales against a party sued as nominal defendant on behalf of the Bank of which he was chairman. Of *that Bank the defendant was a member as well at the time when the cause of action arose, as also when the action was brought, and when the judgment was recovered in the colonial Court. The present action is therefore free from the various difficulties which might have arisen if, at one of those periods, the defendant had not been, or had ceased to be, a member of the Bank. The judgment in reality is a judgment against "the defendant and others." A judgment in a foreign or in a colonial Court, though certainly not conclusive, is *primâ facie* to be considered to be good. The *onus* of impeaching it lies on the defendant. * *

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(1) In 1845, the Bank of Australia, then being in pecuniary difficulties, applied to the Bank of Australasia for assistance. Upon the negotiation of the loan, an agreement was entered into by the directors of the Bank of Australia with the Bank of Australasia, which contained stipulations, some of which the directors of the Bank of Australia had no authority to enter into. Various sums were advanced by the Bank of Australasia to the Bank of Australia in pursuance of the agreement, and, on the 30th of October, 1843, a balance of 154,000*l.* was struck. For this amount and interest a promissory note was signed by the chairman of the Bank of Australia, pursuant to a resolution of the directors, "for value received, for and on behalf of the Bank of Australia." The shareholders of the Bank of Australia denied the liability of the Bank to pay this note, on the ground that the directors had exceeded their powers. An action was brought on this note against Breillat, the then chairman of the Bank of Australia, in

the Supreme Court of New South Wales, in which action a verdict was found for the defendant, under the direction of DICKINSON and A'BECKETT, JJ., against the opinion of ALFRED STEPHEN, Ch. J. Upon appeal against the judgment pronounced upon this verdict, it was held by the Privy Council that the directors of the Bank of Australia had the power of managing partners in an ordinary banking partnership, and that amongst such powers was the power of borrowing money for the purpose of discharging the existing liabilities of the Bank until the assets should be realised, and that the circumstance of the agreement for the loan being accompanied with stipulations, some of which were *ultra vires*, did not discharge the Bank of Australia from liability to repay the loan: *Bank of Australasia v. Breillat*, Chairman of the Bank of Australia (upon an appeal from the colonial judgment, 79 R. R. 24 (6 Moore, P. C. 152).

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[He cited and distinguished *Steward v. Greaves* (1) and *Chapman v. Milvain* (2), and relied on *Blewitt v. Gordon* (3), *Mason v. Nicholls* (4), and *Hanmer v. White* (5)].

Upon the demurrer to the fourth plea, the question is, whether, assuming the declaration to be good, that plea affords a sufficient answer. To what extent does the plea establish the non-residence within the colony? It excludes the defendant's being resident at the time the action against Breillat was brought on which the judgment was given. Consistently with this allegation the defendant may have been resident in the colony until shortly before the bringing of that action (6). It is submitted that the plea should have negated the residence in the colony at any time before action brought. At all events, it should have stated that the defendant had no property within the colony. The plea alleges that the defendant had not at any time notice or knowledge of the summons, the process, or the proceedings. This allegation must be understood as merely denying actual notice or knowledge; whereas, supposing notice to be necessary, notice to an agent, although it should never have been communicated to the defendant, would have been sufficient: *Vallee v. Dumergue* (7). So, notice left at the last known place of abode within the colony might, for anything which appears here, be sufficient: *Becquet* and others v. *MacCarthy* (8); *Cowan v. Braidwood* (9); *Reynolds v. Fenton* (10).

With respect to the replication to the fourth plea, it is a sufficient answer to the fourth plea, assuming that the fourth plea can be supported. It sets out foreign law, which is to be dealt with here as matter of fact.

[683] (MAULE, J.: Whether the law of a foreign country is binding or not in a particular case, is matter of law here and elsewhere.)

The tenth plea is bad in form and in substance. The plea attempts to set up an estoppel, but it prays that the plaintiffs may be precluded from asserting what the defendant admits to

(1) 62 R. R. 730 (10 M. & W. 711).

(2) *Post*, p. 564 (5 Ex. 61).

(3) 1 Dowl. N. S. 815.

(4) 14 M. & W. 118.

(5) 12 M. & W. 519.

(6) There appears to be an ambiguity about the words "or at any time since," which may mean either "since the bringing of the action, and since the recovery of the judgment," or since the latter period only; in which

case the defendant might within the terms of the plea, have been resident within the colony from the commencement of the action to the recovery of the judgment, *exclusive*.

(7) 80 R. R. 556 (4 Ex. 290).

(8) 36 R. R. 803 (2 B. & Ad. 951).

(9) 56 B. R. 561 (1 Man. & G. 882; 2 Scott, N. R. 128).

(10) 71 R. R. 315 (3 C. B. 187).

be true, namely, that the defendant promised as alleged in the declaration. If the plea is to be regarded as a plea of judgment recovered, not only are the commencement and the conclusion informal, but the plea is bad in substance, as not showing any merger of which our Courts can take notice: *The General Steam Navigation Company v. Guillou* (1); *Smith v. Nicolls* (2).

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Willes, contra:

The first count of the declaration is bad. No foundation is laid for the promise which the defendant is alleged to have made, except the colonial judgment obtained under the provisions of the colonial Act. Now, that Act gives the judgment-creditor a remedy against the property of persons who were members of the Bank for the time being, *i.e.* at the time of the award of execution, but nothing further. It is said that the colonial Act gives a cumulative remedy; but no ground is shown for that assertion. Supposing, however, the remedy to be so far cumulative that the plaintiffs might have either sued the defendant upon the original cause of action, or brought their action against the chairman, they have made their election. Professor Story says (3), "Suppose a contract by the law of our country to involve no personal obligation, as was supposed to be the law of France in a particular case which, came in judgment (4), but merely to confer a *right to proceed *in rem*, such a contract would be held everywhere to involve no personal contract whatsoever." So, here, the right to sue the chairman being conferred by statute, the recoveror of a judgment against the chairman can enforce the judgment so obtained, only by the mode pointed out by the statute.

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In the fourth plea the defendant insists that he is not responsible for the acts or defaults of an agent appointed, not by himself, but by the Act of a Legislature to which he was a stranger, and by whose Acts he was not bound. It is contrary to natural justice to proceed against a party who is not within the jurisdiction of the Court in which proceedings are commenced and carried on, and which has no notice of such proceedings: *Reynolds v. Fenton* (5); *Becquet v. MacCarthy* (6); *Buchanan v. Rucker* (7); *Ferguson v. Mason* (8); Story's Conflict of Laws, sects. 546, 547, &c.

(1) 63 R. R. 807 (11 M. & W. 387).

East, 453, 455.

(2) 50 R. R. 658 (5 Bing. N. C. 208).

(5) 71 R. R. 315 (3 C. B. 187).

(3) Conflict of Laws, 267.

(6) 36 R. R. 803 (2 B. & Ad. 951).

(4) *Melan v. Fitzjames*, 1 Bos. & P.

(7) 9 R. R. 531 (1 Camp. 63).

138; overruled in *Imlay v. Ellefson*, 2

(8) 52 R. R. 301 (11 Ad. & El. 170).

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The tenth plea is a good plea in bar in substance; and the supposed informality in the prayer of judgment is not material. The plea shows, that, by the colonial enactment, the judgment recovered against the chairman was final and conclusive. In *Smith v. Nicolls* (1), the plea was held bad for the want of such an allegation: *General Steam Navigation Company v. Guillou* (2); Story's Conflict of Laws, sects. 509, 510, 522, 603, 604, 605, &c.

Channell, Serjt., in reply:

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The cases upon the Bank Act do not apply. The colonial Act, ss. 5, 7 (*suprà*, p. 494), gives a right to reimbursement and contribution. By taking a share in the Bank, the defendant constituted *the persons by whom the affairs of the Bank were conducted, his agents in everything connected with the affairs of the Bank.

The tenth plea admits the liability of the defendant upon the original contract; and, although a colonial judgment works a merger in the colony, it is otherwise in the Courts of this country, where no foreign or colonial judgment is treated as matter of record: *Smith v. Nicolls*; *Robertson v. Sir William John Struth* (3).

WILDE, Ch. J.:

It appears to me that the declaration is sufficient, and that both the fourth and the tenth pleas are bad.

The objection to the declaration is to the first count. That count states that the defendant was a member of a Banking Company acting under a colonial statute; a statute which may be assumed to have been obtained at the request of the parties. It provides, that one member holding a principal office in the Company, may sue and be sued, instead of the whole body; and that execution may issue against the property of the other members of that body. But, while giving this benefit to the Company, the Act provides that it shall not vary the rights or the liabilities of the parties. Now, independently of the colonial Act, the defendant would have been liable in respect of the demand for which the defendant is now sued; and, if the judgment had been recovered in an action brought against all the members jointly, an action of debt or assumpsit would clearly have lain against the defendant upon that judgment.

The first objection taken to the count is, that the remedy given

(1) 50 R. R. 658 (5 Bing. N. C. 208).

(2) 63 R. R. 807 (11 M. & W. 877).

(3) 64 R. R. 684 (5 Q. B. 941).

by the colonial Act upon the judgment, is not against the person of the shareholder, but is *limited to execution against the goods of those who are partners at the time the execution issues. I think this is not so; but that the effect of the colonial Act is to extend the effect of the judgment. The first count of the declaration shows, that, under the colonial Act, all previous rights and liabilities of the parties were reserved. These are sufficient to bind the defendant.

The fourth plea states that the defendant had not at any time notice or knowledge of any summons or process, or of the proceedings in the action in the colonial Court. Suppose he had no notice. The first count declares that the defendant was dealing with the public upon the terms of the colonial Act, and that he assented to the chairman's been considered, for all purposes connected with the suit, as his representative. For these reasons I think the fourth plea bad, and that it therefore becomes unnecessary to consider the objections which have been raised to the replication to that plea.

The tenth plea denies the right of the plaintiffs to sue upon the original causes of action, on the ground that these causes of action were merged in the judgment obtained against the chairman. Where a security of a higher nature is taken for a demand of a lower nature, the latter is merged in the former; and therefore, in the colony of New South Wales, where the judgment recovered against the chairman, is a security of a higher nature than the debt upon which it was founded, a merger no doubt took place. This merger was, however, confined to the district in which the judgment recovered, being there conclusive, was a security of a higher nature than the debt upon which it was founded. But in England the colonial judgment, which stands upon the same footing as a foreign judgment, is not a security of a higher nature than the prior simple contract *debt (1). The principle of merger, therefore, does not apply. Any doubt upon that subject is removed by the case of *Houlditch v. The Marquess of Donegal* (2), in which the House of Lords decided that a foreign judgment is not conclusive, but is merely *prima facie* evidence, reversing a contrary decision in the Court of Chancery in Ireland.

(1) No action of debt, as on matter of record, would have lain here upon the colonial judgment. The remedy would have been either by action of debt *quasi ex contractu*, in which a

defendant might formerly have waged his law, or by action of assumpsit.

(2) 37 R. B. 181 (8 Bligh, N. S. 301).

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I think, therefore, that the plaintiffs are entitled to judgment.

MAULE, J. :

During part of the argument I was not present ; and, as the rest of the COURT are clear that the plaintiffs are entitled to judgment on the whole record, I shall not depart from them. With respect to the sufficiency of the first count and the badness of the fourth plea, I fully concur with what has fallen from the LORD CHIEF JUSTICE. With respect to the tenth plea, I am not so clear.

CRESSWELL, J. :

I am of opinion that the plaintiffs are entitled to judgment. From the pleadings it appears that the defendant was a member of a Company who must be taken to have been a consenting party to the passing of the colonial Act. He must, therefore, be regarded as having agreed that suits upon contracts entered into by the Company, might be brought against the chairman, and that the chairman should for all purposes represent him in such actions. Being his own appointed agent, he had notice of the proceedings. If he had been resident in the colony, he could not have made himself party to the action, or in any manner personally interfered in the proceedings.

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The 5th section of the Act extends the remedy by execution to new shareholders who, but for this enactment, would not have been liable upon contracts to which they were not originally parties. Then comes the 7th section, which reserves all liabilities the parties would otherwise have been under. The object of the Act was to create an additional remedy. It contains no exemption from liability. I think, therefore, that the first count of the declaration is good, and that the fourth plea shows no sufficient answer to it.

The tenth plea, which is pleaded to the subsequent counts framed on that cause of action upon which the judgment declared upon in the first count was founded, does not affect the contracts declared upon in those counts ; it relates only to the manner of proceeding for the purpose of enforcing payment. It may be true, that, in the colony, no further proceeding could be taken. There, the debt had become matter of record, but it is not so in the English Courts. Here, the right to sue upon the original causes of action remains, there being in our Courts no merger of those causes of action in a higher remedy. I think, therefore, that the tenth plea is also bad.

TALFOURD, J. :

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I am of the same opinion. As to the first question, it appears to me that the first count discloses a good cause of action. The object of the colonial law was, not to take away any remedies which the creditor of the Bank would otherwise have had, but to give additional and peculiar remedies.

The second question is, whether the fourth plea presents any answer to the cause of action set forth in the first count. That plea states that the defendant was never resident in New South Wales, and had no notice of the proceedings. The answer to that is, that the defendant was a member of a partnership carrying on *business in the colonies, and was contented to leave his property there to be regulated by the law of the colony.

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The case of *Smith v. Nicolls* (1) is conclusive against the tenth plea. It would be absurd to hold that a colonial judgment was in this country merely matter of inducement to a promise, and yet that it operated as a bar to an action on the causes of action upon which that judgment was founded.

Judgment for the plaintiffs.

ORCHARD v. RACKSTRAW.

(9 C. B. 698—701 ; S. C. 19 L. J. C. P. 303 ; 14 Jur. 605.)

1850.
April 23.

A livery-stable keeper has no lien either for the keep of a horse standing at livery, or for money paid by him, at the request of the owner, for the attendance of a veterinary surgeon upon the horse.

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TROVER, for a horse. Pleas, Not guilty, and not possessed.

At the trial before Maule, J., at the first sitting at Westminster in the present Term, it appeared that the horse in question had been standing at livery at the defendant's stables, and while there the defendant had, at the plaintiff's request, employed a veterinary surgeon to blister the horse for splints; and that, on the horse being demanded by the plaintiff, the defendant claimed a lien to the extent of 26*l.* 13*s.*; which sum was made up of his charge for the standing of the horse and the hire of a chaise, and 30*s.* for the payment to the veterinary surgeon for blistering him.

The learned Judge told the jury that the defendant was not entitled to claim a lien upon the horse, either in respect of the charge for its keep, or of the surgeon's charge for blistering; and

(1) 50 R. B. 658 (7 Scott, 147 ; 5 Bing. N. C. 208).

ORCHARD accordingly a verdict was *found for the plaintiff, damages 31l. 10s.,
 BACKSTRAW^{r.} the value of the horse.

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Bramwell now moved for a new trial, on the ground of misdirection :

It may at once be conceded that the defendant could claim no lien for the standing of the horse : *Judson v. Etheridge* (1) : though an innkeeper has : The case of *An Hostler* (2) ; the only question, therefore, will be, whether he had not a lien for the 30s., the surgeon's charge for the blistering. The general rule of law is, that, wherever anything is done by one to the chattel of another (with his consent) to augment its value, he thereby requires a lien upon it.

(CRESSWELL, J. : Suppose the horse is shod whilst standing at livery, could the livery-stable keeper refuse to allow the owner to use him without first paying the farrier's charge ?)

In *Scarfe v. Morgan* (3), where a claim of lien was set up for a charge for covering a mare, PARKE, B., in giving judgment, said : " The principle seems to be well laid down in *Beran v. Waters* (4), by Lord Chief Justice BEST, that, where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus, the artificer to whom the goods are delivered for the purpose of being worked up into form, or the farrier by whose skill the animal is cured of a disease, or the horse-breaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges. And all such specific liens, being consistent with the principles of natural equity, are favoured by the law, which is construed liberally in such cases. This, then, being the principle, let us see whether this case falls within it ; and we think it does. The object *is, that the mare may be made more valuable by proving in foal. She is delivered to the defendant that she may by his skill and labour, and the use of his stallion for that object, be made so ; and we think, therefore, that it is a case which falls within the principle of those cited in argument." It was a mistake to say that the defendant altogether lost his lien because the horse had originally come into his possession in his character of a livery-stable keeper.

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(1) 3 Tyr. 954.

(2) Yelv. 66.

(3) 4 M. & W. 270.

(4) 33 R. R. 692 (Moo. & Mal. 235).

WILDE, Ch. J. :

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v.
RACKSTRAW.

I think the ruling of my brother MAULE was perfectly right. The horse in question was placed at livery at the defendant's stables. Whatever may have been its origin, the meaning of that contract is now very well understood, viz. that the horse shall be at all times at the use and command of the owner, without any claim of lien on the part of the livery-stable keeper for the keep. Here, however, it is said, that, inasmuch as the defendant had employed a veterinary surgeon, at the plaintiff's request, to exercise his professional skill upon the horse, he at all events had a lien for the surgeon's charge; for, that the defendant being liable to and having actually paid the veterinary surgeon's charge, it was the same as if the work had been done by the defendant himself. Suppose the veterinary surgeon had treated the horse unskilfully, and damaged it, who would have been responsible to the owner, the livery-stable keeper or the surgeon? Clearly not the former. The veterinary surgeon had no lien for his bill, the livery-stable keeper none for the keep of the horse.

CRESSWELL, J. :

I am of the same opinion. The defendant had no lien for his demand for the keep of the horse, and the veterinary surgeon had none for his attendance; and there is no rule of law giving a livery-stable *keeper a lien for money expended upon a horse standing at livery at the request of the owner. The case, therefore, does not fall within the rule of law which confers a lien upon one who expends his money or his labour upon a chattel of another.

[*701]

The rest of the Court concurring,

Rule refused.

DOE D. BAKER v. COOMBES.

(9 C. B. 714—718; S. C. 19 L. J. C. P. 306.)

1850.
April 18.

[714]

A., more than twenty years ago, without the permission of the lord, inclosed a small portion of the waste of a manor, on which he built himself a hut. In 1835, the incroachment having been presented at the lord's court, the then lord of the manor, accompanied by his steward, went to the premises, A.'s family being there, and, stating that he took possession, directed that a stone should be taken out of the wall of the hut, and that a portion of the fence should be removed. All this was done in the absence

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of A. The lord and his steward then retired, and nothing more was done :

Held, that the acts so done by the lord did not amount to a dispossession of A., and a resumption of possession by the lord, so as to entitle the latter to maintain ejectment within twenty years from that time.

THIS was an action of ejectment brought by the defendant, the lord of the manor of Pitfold, in the county of Surrey, to recover the possession of an acre of land, part of the waste of the manor, with a hut erected thereon, which had been many years occupied by the defendant.

The cause was tried before Wilde, C. J., at the last Spring Assizes for Surrey. The evidence was as follows :

[*715] The land in question, which was situate on a spot called Melcomb Bottom, forming part of the waste of the manor of Pitfold, in the county of Surrey, was inclosed, and the hut erected by the defendant, without the permission of the lord of the manor, considerably more than twenty years before the commencement of the action. In the year 1835, this incroachment having been presented at the lord's court, Mr. Pritchard, the then lord of the manor, accompanied by one Woods, the steward, went to the premises, and, finding the defendant's wife and *family there, he entered, and stated that he took possession, and directed that a stone should be taken out of the wall of the hut, and that a portion of the fence should be removed. All this was done without any objection being made on the part of Coombes, who was not then on the spot. Pritchard and the steward then retired.

His Lordship being of opinion that this was not such a taking of possession by Pritchard as to entitle the lessor of the plaintiff, who claimed under him, to maintain ejectment, directed the jury to find for the defendant, which they accordingly did.

Montagu Chambers, for the lessor of the plaintiff, now moved for a new trial, on the ground of misdirection :

The question is whether, that which was done by Pritchard in the year 1835 did not amount to such a taking possession of the land and hut by him as lord of the manor, as to determine the previous tenancy at will as between him and Coombes.

(WILLIAMS, J. : What evidence was there of a tenancy at will?)

A tenancy at will is to be inferred where a man continues in possession of land with the acquiescence of the lord, and without

evidence of any other relation between them; and such tenancy will be assumed to continue until the contrary appears. If that be so, the possession of the defendant here dates only from the year 1835. Since the 3 & 4 Will. IV. c. 27, s. 10 (1), it is true, a mere entry is not enough to determine the tenant's possession. But here something more was done. The lord entered, and took possession as of his own property, without any dissent on the part of the tenant. He thereby acquired such a possession as would have *enabled him to maintain trespass.

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COOMBS.

[*716]

(TALFOURD, J.: Did he turn the defendant and his family out?)

No; but he exercised acts of ownership. The distinction is taken in Co. Litt. 55 b: There is an express ouster and an implied ouster; an express, as, when the lessor cometh upon the land, and expressly forewarneth the lessee to occupy the ground no longer; an implied, as, if the lessor, without the consent of the lessee, enter into the land, and cut down a tree, this is a determination of the will, for that it should otherwise be a wrong in him, unless the trees were excepted, and then it is no determination of the will, for, then the act is lawful, albeit the will doth continue. If a man leaseth a manor at will, whereunto a common is appendant, if the lessor put in his beasts to use the common, this is a determination of the will. The lessor may, by actual entry into the ground, determine his will in the absence of the lessee; but by words spoken from the ground the will is not determined until the lessee hath notice. No more than the discharge of a factor, attorney, or such like, in their absence, is sufficient in law until they have notice thereof." Assuming this to have been a tenancy at sufferance, the acts done by Pritchard in 1835 would be a determination of that tenancy; and a new tenancy commenced at that period.

(TALFOURD, J.: You would assimilate this to the case of *Doe d. Bennet v. Turner* (2).)

WILLIAMS, J.: *You must make out an original tenancy at will, and a new tenancy at will; and there is no pretence for either.)

[*717]

That which was done by Pritchard in 1835 was done for the express purpose of preventing any title growing against him.

(1) "No person shall be deemed to have been in possession of any land within the meaning of this Act, merely by reason of having made an entry thereon."

(2) 56 R. R. 692 (7 M. & W. 226).

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WILDE, Ch. J. :

I think this case admits of no doubt. The question turns upon that which took place in the year 1835. Up to that time there clearly was no tenancy at will. It appeared, that, at the time the inclosure was originally made, Coombes applied to the lord for leave to make it, and that it was refused, and the inclosure was made and the hut afterwards built without leave. His possession therefore was adverse; and, unless the acts done in 1835 deprive the defendant of the benefit of the Statute of Limitations, this ejectment cannot be maintained. What, then, was done upon that occasion? Pritchard went with his steward to the cottage, the defendant not being there, and, removing a stone from the wall, and displacing a portion of the fence, stated that he took possession. The defendant's wife and family were not removed from the premises, or desired to remove. Unfortunately for the lord, he did not do enough to secure his rights. The defendant is not to be prejudiced by what was thus done in his absence. I left it to the jury to say whether the lord had done enough to acquire possession. They found that he had not; and in truth there was nothing to leave to them. The acts done by Pritchard clearly amounted to no more than an entry, which since the late statute is not enough to bar the tenant's right unless accompanied by circumstances which would restore the possession of the land to the lord. The tenant was *not removed, nor was anything done to disturb him in his possession. He might have brought trespass. His possession having commenced adversely more than twenty years ago, and nothing having occurred to interrupt or put an end to it, this ejectment is clearly too late.

[*718]

CRESSWELL, J. :

I am of the same opinion. It seems to me that Pritchard, the lord, when he intended to resume possession of the land in question in 1835, from a feeling of kindness to the incroacher, abstained from doing enough to secure his rights. It is clear that he was out of possession, and that there was no tenancy at will before the year 1835. The defendant was there as a trespasser. The 10th and 11th sections of the 3 & 4 Will. IV. c. 27, must be looked at together. The latter throws light upon the former; it enacts that "no continual or other claim upon or near any land, shall preserve any right of making an entry or distress, or of bringing an action." That section treats the making an entry as something more than merely being on the land, and claiming it. The 10th section seems

to require something more than the merely formally going upon the land. The making an entry amounts to nothing unless something is done to divest the possession out of the tenant and revest it in fact in the lord. We are bound by the plain words of the statute.

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v.
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WILLIAMS, J. :

I am of the same opinion. It is quite clear that the lord was not in possession of the land and the hut in question in the year 1835, and that no tenancy at will ever existed.

TALFOURD, J. :

It is with great regret that I feel myself compelled to come to the same conclusion. The kindness and forbearance of the lord have unfortunately *furnished the tenant with the weapons to resist his right.

[*719]

Rule refused.

KIMPTON v. WILLEY.

(9 C. B. 719—729 ; S. C. 19 L. J. C. P. 269 ; 14 Jur. 762.)

1850.
April 30.

[719]

A., having a cause of action against B. for 19l. 0s. 8d. for money lent between the years 1846 and 1849 ; and also a cause of action against him on a separate account, for goods sold and delivered, work and labour, and money paid, between the years 1845 and 1849, amounting to 19l. 19s., after deducting a payment on account of 8l. 5s. 3d., levied two plaints in respect of them in the county court : Held, that this was not a splitting or dividing of " a cause of action," within the meaning of the 63rd section of the 9 & 10 Vict. c. 95 (1).

Held, also, that the Judge of the county court had jurisdiction to inquire whether B. had consented to A.'s claim being so reduced, and that that fact need not be stated in the particulars of demand.

Semble, that prohibition lies to the county court even after execution levied.

LUSH, on a former day in this Term, obtained a rule *nisi* for a prohibition to the Judge of the Herefordshire County Court, prohibiting him from proceeding further on the judgments obtained by the plaintiff in two plaints in that Court.

The particulars of demand in the first of these cases, plaint C 142, was as follows :

					£	s.	d.
1846. April 20.	Cash	-	-	-	-	10	0 0
1849. April 7.	Cash	-	-	-	-	5	0 0
1849. July 14.	Cash	-	-	-	-	2	0 0
	Interest	-	-	-	-	2	0 8
					£19	0	0

(1) See now s. 81 of the County Courts Act, 1888.—J. G. P.

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WILLEY.

The particulars in plaint C. 143 were as follows :

			£	s.	d.
	1845. Nov. 25.	Journey to Baron Dimsdale	-	2	2 0
		Chaise hire - - -	-	0	10 6
	1846. May 18.	Taking inventory - - -	-	5	5 0
		Writing and copying - - -	-	0	10 6
	July 14.	Two quarters of oats - - -	-	2	14 6
[720]	1849. April 7.	Oats - - - - -	-	4	8 0
		Tares - - - - -	-	1	10 0
	May .	Oats - - - - -	-	1	7 0
	July 12.	Journey - - - - -	-	2	2 0
		Expenses - - - - -	-	0	10 6
		Very many attendances - - -	-	6	16 0
			<hr/>		
			£27 16 0		
	Received from William Pinnock	- - - - -	-	8	5 3
			<hr/>		
			£19 10 9		
	Commission - - - - -	- - - - -	-	0	8 0
	Receipt stamp - - - - -	- - - - -	-	0	0 3
			<hr/>		
			£19 19 0		
			<hr/>		

The affidavit of the defendant and his attorney, upon which the rule was moved, stated, that both plaints came on to be heard before the Judge of the county court on the 20th of March, 1850, plaint C. 143 being first called on; that the defendant's attorney objected that the Judge had no jurisdiction, because (as disclosed by the particulars) the demand exceeded 20*l.*, though reduced below that sum by a credit for 8*l.* 5*s.* 8*d.* given without the defendant's consent; and that the Judge overruled the objection, heard the case, and gave judgment for the plaintiff for 17*l.* 9*s.*, and costs 5*l.* 1*s.*; that plaint C. 142 was then called on, when the defendant's attorney objected that the Judge had no jurisdiction, because the subject-matter of that and the preceding plaint together constituted but one cause of action, exceeding 20*l.*, and that it was not competent to the plaintiff to split them; and that this objection also was overruled by the Judge, who, after hearing the case, gave judgment for the plaintiff for 17*l.*, costs 4*l.* 8*s.* 6*d.*

Hawkins now showed cause :

Execution having been executed in this case, the application for a prohibition is too late; there remains nothing upon which it could operate: *Hall v. Norwood* (1); *Re Poe* (2); *Robinson v. Lenaghan* (3).

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v.
WILLEY.
[721]

(WILLIAMS, J. : In the *Articuli Cleri*, 2 Inst. 602, in the answer to Art. 3, it is said that “ the King’s Courts that may award prohibitions, being informed, either by the parties themselves, or by any stranger, that any Court, temporal or ecclesiastical, doth hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same, as well after judgment and execution as before.”

WILDE, Ch. J., referred to Com. Dig. Prohibition (D.), and to *Roberts v. Humby* (4).

Then, as to the merits, there was no splitting of a cause of action here, within the case of *Grimbly v. Aykroyd* (5). When the first plaint was heard, it did not appear that the plaintiff had any further claim against the defendant. [He cited *Neale v. Ellis* (6), *Rex v. The Sheriff of Herefordshire* (7), and *Wickham v. Lee* (8).]

(MAULE, J. : In *Jagoe’s County Court Practice*, 52, I find an Irish case upon this subject, which is thus stated: “ Splitting demands, prohibited by the Irish statutes (9) in nearly the same words as in this section, has been a subject of judicial consideration in a case on appeal before Bushe, Ch. J., at the Dundalk Summer Assizes, 1833: The plaintiff below brought a civil bill for use and occupation, to recover one gale of rent. There were two gales due at the time, which together amounted to a sum exceeding the jurisdiction, but separately were within it. The plaintiff below obtained a decree, against which the defendant appealed. For the appellant it was contended that the case came within the prohibitory words of the statute, as the two gales might clearly have been included in one declaration, and that it was vexatious to divide the claim. For the respondent it was argued, that the true test was, not whether the claim might be joined in the same declaration; and that a debt might by mutual arrangement be divided into

[723]

(1) 1 Sid. 166.

(2) 39 R. R. 621 (5 B. & Ad. 681).

(3) 2 Ex. 333.

(4) 49 R. R. 535 (3 M. & W. 120).

(5) 1 Ex. 479.

(6) 1 Dowl. & L. 163.

(7) 1 B. & Ad. 672.

(8) 76 R. R. 334 (12 Q. B. 521).

(9) Courts of Conscience Acts.

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several aliquot parts, and a promissory note taken for each part, which was frequently done for the purpose of making the summary remedy by civil bill attach, to recover each separately, which could not be the case while the demand was entire and undivided. BUSHÉ, Ch. J., referred to the case of *Cairns v. Whelan* (1), as bearing upon the question, and was at first inclined to consider the decree erroneous: but *Mr. Hannan, amicus curiæ*, having referred

[*724]

*him to the case of *Rex v. The Sheriff of Herefordshire* (2), the CHIEF JUSTICE on the next day stated that that case was so much in point as to put an end to any further difficulty, and affirmed the decree.”)

The mere statement of the defendant that the subject-matters of the two plaints form but one cause of action, is not enough to oust the jurisdiction of the county court. There must be some evidence to which the Judge may apply his discretion. *Vines v. Arnold* (3), *Woodhams v. Newman* (4), and *Beswick v. Capper* (5), were also cited.

Lush, in support of his rule:

The particulars of demand show that the plaintiff's claim in respect of plaint C. 143, was for 27*l.* 16*s.*, and that there was a set-off reducing it to 19*l.* 19*s.*

(MAULE, J.: Consistently with what appears on the affidavit, the 19*l.* 19*s.* might have been ascertained as a liquidated balance.)

The matter being *primâ facie* beyond the jurisdiction of the county court, it is for the plaintiff to show facts to bring the case within it. In *Cole v. Knight* (6), where the plaintiff, having an original claim against the defendant for more than 20*l.*, gave credit for certain sums as payments on account, some of which were in fact moneys lent to him by the defendant, others, moneys received by him to the defendant's use, and others, moneys the produce of goods of the defendant which the plaintiff had sold, and the proceeds of which he had appropriated; and the plaintiff by this, and by abandoning the remainder, reduced his claim below 20*l.*, and brought a plaint in the county court—this Court awarded a prohibition. Although the Judge must exercise his discretion at the time as to whether or not the case is within his jurisdiction, his *decision is not

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(1) *Hudson & Brooke*, 552.

(4) 7 C. B. 654.

(2) 1 B. & Ad. 672.

(5) 7 C. B. 669.

(3) 79 R. R. 653 (8 C. B. 632).

(6) *New County Court Cases*, 164.

conclusive, but may be reviewed on a motion for a prohibition : *Thompson v. Ingham* (1). The subject-matter of the two complaints here constituted one "cause of action," as that is explained in the judgment of the Court of Exchequer in *Grimbly v. Aykroyd*. If the whole formed one cause of action in that sense, the jurisdiction clearly is exceeded. The case of *Rex v. The Sheriff of Herefordshire* is distinctly overruled by *Grimbly v. Aykroyd*, and by the test suggested by ERLE, J., in *Wickham v. Lee*. It is clear that all these demands might have been included in one count.

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WILDE, Ch. J. :

This case has undergone some considerable discussion, the Court being anxious not to run counter to any of the authorities. In the result, however, it does not occur to me that it presents any very serious difficulty. This is an application for a prohibition, on the ground that the county court has exceeded its jurisdiction. Let us see how the matter is presented before us. The affidavits upon which the rule was moved, state that two complaints were entered in the county court against the defendant, at the suit of the plaintiff,—the one for 19*l.* 0*s.* 8*d.* for money lent and interest,—the other for 19*l.* 19*s.*, being the balance of an account for work and labour and goods sold, amounting originally to 27*l.* 16*s.*; and that these two sums added together exceed the amount for which the county court has jurisdiction. The affidavits then go on to allege, that both complaints were heard on the same day; that, when the first was called on, the defendant's attorney objected to the hearing thereof, on the ground that the Judge had no jurisdiction, inasmuch as the particulars of demand disclosed a cause of action exceeding 20*l.*, which could not be reduced by the set-off (also *disclosed by the particulars), so as to bring it within the jurisdiction, in the absence of an adjustment or ascertainment of the balance by the assent of both parties; and that the Judge over-ruled the objection, heard the case, and made an order upon the defendant to pay 17*l.* 9*s.* for debt, and 5*l.* 1*s.* for costs. The affidavit further states that the other complaint was then called on, when the defendant's attorney objected, that, as the plaintiff's claim in the whole amounted to 89*l.* in respect of one entire cause of action, it was not competent to him to split it for the purpose of bringing two actions in the county court; and that the Judge notwithstanding proceeded to hear the complaint, and made an order on the defendant to pay the sum

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demanded (19*l.* 0*s.* 8*d.*), and costs. The defendant himself, by affidavit, negatives that there was any settlement of accounts between himself and the plaintiff, or any agreement that the set-off should be allowed. So far, therefore, as regards the first plaint, this is a case in which the county court has given judgment for the plaintiff for 17*l.* 9*s.* There is not a word in the affidavits as to how that amount is made up. It is not stated that it was reduced by a set-off. Beyond all doubt, it is the duty of a party who comes to this Court to ask for a prohibition to lay before it proper grounds for inducing it to come to the conclusion that there has been an excess of jurisdiction on the part of the inferior tribunal. How does that appear here? The affidavits merely state, that, on the plaint being called on, the defendant's attorney objected to the hearing, but that the Judge, notwithstanding that objection, heard and disposed of the plaint. Was it the duty of the Judge to yield to an objection thus presented to him? How could he anticipate what the case would be? It might have been shown that the sum sought to be recovered was an agreed balance. The objection is not, that, at the conclusion of the case, an excess of *jurisdiction appeared. The case, then, stands thus: There was a plaint in which the plaintiff claimed 19*l.* 19*s.*, and a judgment given for the plaintiff for 17*l.* 9*s.* and costs, without anything to show that the Judge in any way exceeded his jurisdiction. The only objection disclosed by the affidavits was one that was perfectly unfounded, and very properly over-ruled by the Judge. The present case is wholly beside that of *Beswick v. Capper*. There, it appeared that the plaintiff was allowed in the county court to prove a demand of 227*l.* 2*s.* 8*d.*, and to reduce the amount by a set-off of 186*l.* 16*s.* 9*d.*, and then to abandon so much of the balance as exceeded 20*l.*, and so to take a verdict for 20*l.* It, therefore, appeared affirmatively to the Court in that case that the Judge of the county court had gone into matters much beyond his jurisdiction. Here, however, there is no one fact to lead the Court to the conclusion that there has been any excess of jurisdiction, and, consequently, so far as regards the plaint which was first heard in the county court, no ground for a prohibition.

As to the other plaint also, I am of opinion that the plaintiff has failed to make out a case for the interposition of this Court. That part of the case stands upon a different footing. The plaintiff claimed 19*l.* 0*s.* 8*d.* for money lent. The objection was, that that demand, though presented as a separate and distinct demand, was,

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in truth, only part of a larger demand which exceeded the amount to which the jurisdiction of the county court is limited. Suppose the prohibition were to go, what would be its effect? What would the plaintiff recover on that account, if he sued in the superior Court? Why, 19*l.* 0*s.* 8*d.* only. Why should he not proceed for that in the county court? The case is precisely one that is provided for by the statute. If a plaintiff, suing in a county court, proves a demand *exceeding the limits of the county court's jurisdiction, he will be nonsuited unless he will consent to abandon the excess; and the fact of his having done so must be recorded on the face of the judgment. Nothing of that kind was done here. At the time this plaint was heard, the demand thereby sought to be recovered was the only demand which the plaintiff had against the defendant; for, he had already recovered a judgment of the same Court for the other part of his demand, and 19*l.* 0*s.* 8*d.* was all he could be entitled then to recover in any Court. But, independently of that, this is a demand for money lent. The other was for work and labour, goods sold and delivered, and for commission. It is insisted that the whole formed but one entire debt. What evidence was there of that? It did not appear that the parties had ever treated it as one entire demand; and the items do not necessarily show that it formed one account. Both grounds, for a prohibition, therefore, fail, and the rule must be discharged.

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MAULE, J.:

I am of the same opinion. The LORD CHIEF JUSTICE has gone so fully into the reasons on which the judgment of the Court is founded, that it is enough for me to say that I entirely concur in the view he has taken. With respect to the case of *Thompson v. Ingham*, the record conclusively showed that the title to the land came in issue in the county court. Here, nothing appears to show that a question of a larger sum of 20*l.* was in issue. If it had appeared that a larger sum than 20*l.* was in issue, and that the county court had decided on a controverted question whether that was so or not, if he had no jurisdiction to entertain a claim exceeding 20*l.*, we should have been bound to treat it as a case of excess of jurisdiction. I do not, however, think that that is so. If the party, having a demand for more than 20*l.*, chooses to claim no more *he may recover that sum, electing to abandon the rest. There is, therefore, a manifest difference with respect to the

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jurisdiction of the county court, between the implied prohibition as to debts exceeding 20*l.* and the prohibitory clause as to matters of title. That materially distinguishes the case of *Thompson v. Ingham* from the present case.

WILLIAMS, J. :

I am of the same opinion. A prohibition ought not to go unless it clearly appears that the Judge of the inferior Court has acted without jurisdiction. The burthen of making that out is cast upon the party making the application. I am not satisfied, upon the affidavits, that the subject-matter of the two claims here constituted "one cause of action," within any reasonable interpretation of the 63rd section of the Act. With regard to the point made as to the set-off, all that the affidavits disclose, is, that there was a premature objection urged on the part of the defendant at the trial, which the Judge very properly over-ruled.

TALFOURD, J. :

I am of the same opinion. As to the main question, the case seems to me to differ materially from that of *Grimbly v. Aykroyd*. There is nothing here giving a common character to the two sets of items, as there was in that case, except that the whole might have been included in one declaration. In *Grimbly v. Aykroyd* there was one entire system of dealing, the demand arising all out of one state of things. This rule, therefore, may well be discharged without at all interfering with the authority of that case.

Rule discharged, with costs.

1850.
June 10.
[774]

PALLISTER v. THE MAYOR, &c., OF GRAVESEND.

(9 C. B. 774—787; S. C. 19 L. J. C. P. 358.)

A bond given by a corporation, after the passing of the 5 & 6 Will. IV. c. 76(1), but before the passing of 6 & 7 Will. IV. c. 104(1), to secure a sum of money borrowed for the purpose of paying debts contracted by the corporation before the passing of the first-mentioned Act, is valid, notwithstanding the 92nd section of the former Act might interpose a difficulty in the way of the obligee's obtaining satisfaction of a judgment thereon (2).

THIS was an action of debt, in which the plaintiff declared in his first count on a bond made by the defendants on the 1st of July,

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| (1) Repealed by 45 & 46 Vict. c. 50. | Q. B. D. 492, 58 L. J. Q. B. 558, a |
| (2) Cited with approval in <i>Att.-Gen. v. Mayor, &c. of Newcastle-upon-Tyne and North Eastern Railway</i> (1889) 23 | case upon the corresponding section (s. 144) of the Municipal Corporations Act, 1882.—J. G. P. |

1836, in the second for money lent, in the third for money had and received by the defendants to his use, in the fourth for interest, and in the fifth for money due upon an account stated.

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Second plea, to the first count, that the defendants are a body corporate, and the mayor, aldermen, and burgesses of the borough of Gravesend, being the borough of Gravesend in the schedule A. to a certain Act made and passed in the sixth year of the reign of his late Majesty, King William the Fourth, intituled "An Act to provide for the regulation of municipal corporations in England and Wales," (1) and that, after the passing of the said Act, and before the making of the said supposed writing obligatory, to wit, on the 26th of December, 1835, councillors under the provisions of the said Act were duly elected for the first time, and the said election was then duly declared; and thereupon then the mayor, jurats, and inhabitants of the villages and parishes of Gravesend and Milton, in the county of Kent, being the governing body of the body corporate named in conjunction with such borough in the said schedule, went out of office, and their whole powers and *duties ceased, pursuant to the said Act†: That afterwards, and after the passing of the said Act, and before the making of the said supposed writing obligatory in the said first count mentioned, to wit, on the 1st of January, 1836, a treasurer of the said borough, to wit, one John Hales, was duly elected according to the provisions of the said Act: That, before the making of the said supposed writing obligatory, to wit, on the day and year last aforesaid, they, the defendants, were, and from thence hitherto had been, a corporation within and subject to the provisions of the said Act, and not otherwise: That afterwards, and before the passing of an Act of Parliament made and passed in the seventh year of the reign of his late Majesty, King William the Fourth, intituled "An Act for the better administration of the borough fund in certain boroughs" (2), and before the passing of a certain Act of Parliament made and passed in the first year of the reign of our lady the now Queen, intituled "An Act to amend an Act for the regulation of municipal corporations in England and Wales" (3), to wit, on the 1st day of July, 1836, it was unlawfully agreed by and between the plaintiff and the defendants, that the plaintiff should lend and advance to the defendants the sum of 600*l.* to be secured by such bond so conditioned as above set forth: That the

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(1) 5 & 6 Will. IV. c. 76.

(3) 7 Will. IV. & 1 Vict. c. 78.

(2) 6 & 7 Will. IV. c. 104.

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plaintiff did then unlawfully lend and advance to the defendants the said sum of 600*l.*, and the defendants did then unlawfully make and deliver to the plaintiff the said supposed writing obligatory in the first count mentioned, and the same then was made and sealed as therein mentioned, and in pursuance of the said loan and advance made to the said body corporate after the passing of the said Act to provide for the regulation of *municipal corporations in England and Wales: That the said writing obligatory was not made or given to secure the payment of any lawful debt due from the said body corporate to any person, contracted before the passing of the said last-mentioned Act, and unredeemed, or any part thereof, or the payment of any interest of such debt or any part thereof, or any part of such interest, nor was the said supposed writing obligatory made or given in respect of any right, interest, claim, or demand of any person or persons, or body corporate or bodies corporate, by virtue of any proceeding either at law or in equity which had been instituted before the passing of the said last-mentioned Act, or at any other time, or by virtue of any mortgage or otherwise: That the said supposed writing obligatory was not given for, towards, or on account of † † the salary of any mayor, or of any recorder or police magistrate whatever, or for, towards, or on account of the salary of any town-clerk or treasurer whatever, or of any other officer at any time appointed by the council of the said borough, or for, towards, or on account of any payment of any expenses incurred at any time in preparing or printing any burgess-lists, ward-lists, or notices, or other matters attending such elections as are in the said Act mentioned, or for, towards, or on account of any sum whatever paid or to be paid by the said borough to the treasurer of any county as in the said last-mentioned Act is provided, or for, towards, or on account of the expense of maintaining any borough-gaol, house of correction, or corporate buildings whatever, or the payment of any constables, or of any other expenses incurred in carrying into effect the provisions of the said last-mentioned Act, of which several premises the plaintiff had always had notice; wherefore the defendants said that the said writing obligatory was and is void, illegal, and of no effect.

Verification.

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To this plea the plaintiff replied, that the said sum of 6,000*l.* lent and advanced by the plaintiff to the defendants as in the second plea mentioned, was money borrowed by the council of the said borough for the purpose of being applied, and which was actually

applied, to wit, on &c., towards the satisfaction and discharge of a debt contracted by the said body corporate before the passing of the said Act made and passed in the sixth year of the reign of his late Majesty King William the Fourth, intituled "An Act to provide for the regulation of municipal corporations in England and Wales," to wit, a certain debt of 670*l.* due and owing to one William Wood.

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Demurrer, on the ground that it did not appear by the second plea that there was any bargain between the plaintiff and the said council and the said William Wood, or either of them, that the said money should be or was borrowed or applied for the purpose in the plea mentioned. Joinder.

Fifth plea, to the second, fourth, and fifth counts, that the defendants are a body corporate, &c. (as in the second plea, down to the first [obelisk]:) That afterwards, and after the passing of the said Act, and before the lending of the moneys in the second count mentioned, to wit, on the 1st of January, 1836, a treasurer of the said borough, to wit, one John Hales, was duly elected according to the provisions of the said Act: That, before the accruing of any of the supposed causes of action in the introductory part of this plea mentioned, to wit, on &c., the defendants were, and from thence hitherto had been, a corporation within and subject to the provisions of the said Act, and not otherwise: That afterwards, and before the passing of an Act of Parliament made and passed in the seventh year of the reign of his late Majesty King William the Fourth, intituled "An Act for the better administration of the borough *fund in certain boroughs" (1), and before the passing of a certain Act of Parliament made and passed in the first year of the reign of our lady the now Queen, intituled "An Act to amend an Act for the regulation of municipal corporations in England and Wales" (2), to wit, on the 1st of July, 1836, the said money in the second count mentioned was unlawfully lent to the defendants by the plaintiff: (The plea then went on to aver that the money in the fourth count mentioned was interest upon, and that the account stated in the fifth count mentioned was stated in respect of, the money lent as in the second count mentioned.) That the said supposed debt and causes of action in the introductory part of that plea mentioned were not contracted, and did not accrue, before the passing of the first-mentioned Act. (The plea then proceeded to aver that the debt was not contracted in respect of any of the

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(1) 6 & 7 Will. IV. c. 104

(2) 7 Will. IV. & 1 Vict. c. 78.

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Replication, that the said sum of money in the second count mentioned was borrowed by the council of the borough for the purpose of being applied, and which was actually applied, to wit, on &c., towards the satisfaction and discharge of a debt contracted by the said body corporate before the passing of the said Act made and passed in the sixth year of the reign of his late Majesty King William the Fourth, intituled "An Act to provide for the regulation of municipal corporations in England and Wales," to wit, a certain debt due and owing to one W. Wood.

[*779] Demurrer, on the ground that it did not appear by the fifth plea that there was any bargain between the plaintiff and the said council and the said W. Wood, or *either of them, that the said money should be or was borrowed or applied for the purpose in that plea mentioned. Joinder.

Sixth plea, to the third count, that the defendants were a body corporate mentioned in schedule A. of the 5 & 6 Will. IV. c. 76 ; that councillors were duly elected, and the old governing body ceased ; that, after the passing of the Act, and before the accruing of the cause of action in the third count mentioned, to wit, on &c., a treasurer was elected, to wit, &c. ; that the defendants were and had been a corporation under the provisions of the Act ; that, before the passing of the statute 6 & 7 Will. IV. c. 104, and before the passing of the statute 7 Will. IV. & 1 Vict. c. 78, to wit, on &c., it was unlawfully agreed by and between the plaintiff and the defendants, that the plaintiff should lend and advance to the defendants the sum of 600*l.*, to be secured by a bond to be made and executed by the defendants, whereby they should acknowledge themselves to be held and firmly bound to the plaintiff in the penal sum of 1,200*l.*, with a condition for the payment of 600*l.*, and interest at the rate of 5*l.* per centum per annum ; that the plaintiff did then unlawfully pay, lend, and advance to the defendants the said sum of 600*l.* upon the terms aforesaid, and the defendants then had and received the same in pursuance of the said last-mentioned agreement for the said loan and advance, which was the said money in the said third count mentioned, and which said having and receiving was the said having and receiving therein mentioned ; that they, the defendants, gave and delivered to the plaintiff the said supposed writing obligatory in the said first count mentioned, and no other, being so null and

void as in the second plea mentioned ; and that the supposed debt in the third count was not contracted before the passing of the first-mentioned Act. (The plea *then went on to aver that the debt therein mentioned was not contracted in respect of any of the matters mentioned in the 5 & 6 Will. IV. c. 76, s. 92, as in the second plea, from the double [obelisk] to the end ; concluding with a verification.)

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To this plea the plaintiff demurred specially, assigning for causes that the plea was argumentative ; that it did not give colour ; that it was consistent with the facts stated that the loan was legal ; and that, if the loan and bond were illegal, the plea showed no reason why the money should not be recovered under the third count. Joinder.

Peacock, for the plaintiff :

The main question is, whether a corporation can legally, since the passing of the Municipal Corporation Reform Act, 5 & 6 Will. IV. c. 76, give a bond for money borrowed by them. The principal objection to the power of the corporation to enter into such a bond as this, arises on the 92nd section of that Act. That section enacts, “that, after the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities belonging or payable to any body corporate named in conjunction with the said borough in the schedules A. and B. to the Act annexed, or to any member or officer thereof in his corporate capacity, and every fine or penalty for any offence against this Act (the application of which has not been already provided for), shall be paid to the treasurer of such borough ; and all the moneys which he shall so receive shall be carried by him to the account of a fund to be called ‘The Borough Fund ;’ and such fund, subject to the payment of any lawful debt due from such body corporate to any person, which shall have been contracted before the passing of this Act, and unredeemed, or so much thereof *as the council of such borough from time to time shall be required or shall deem it expedient to redeem, and to the payment from time to time of the interest of so much thereof as shall remain unredeemed, and saving all rights, interests, claims, or demands of all persons or bodies corporate in or upon the real or personal estate of any body corporate by virtue of any proceedings either at law or in equity which have been already instituted or which may be hereafter instituted, or by virtue of any mortgage or

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otherwise, shall be applied towards the payment of the salary of the mayor and of the recorder and of the police-magistrate hereinafter mentioned, when there is a recorder or police-magistrate, and of the respective salaries of the town-clerk and treasurer, and of every other officer whom the council shall appoint, and also toward the payment of the expenses incurred from time to time in preparing and printing burgess-lists, ward-lists, and notices, and in other matters attending such elections as are herein mentioned, and, in boroughs which shall have a separate court of sessions of the peace as is hereinafter provided, towards the expenses of the prosecution, maintenance, and punishment of offenders, and towards such other sum to be paid by such treasurer of such county as is hereinafter provided, and towards the expense of maintaining the borough gaol, house of correction, and corporate buildings, and towards the payment of the constables, and of all other expenses not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this Act." The section then goes on to direct the application of the surplus, and to provide, that, if the fund should be insufficient for the purposes above mentioned, the council should order a rate to make up the deficiency. There is nothing in that section to prevent the corporation from entering into a bond. It may be that the fund *created by that section cannot be made available for the payment of the bond; but it does not follow that the corporation may not possess other property which would be available, things which yield no profit, such as furniture, paintings, plate, the mace, &c. By the 1st section of the 6 & 7 Will. IV. c. 104, "reciting certain provisions of the 92nd section of the former Act, and that certain difficulties had occurred in putting the said Act into execution," it is enacted, "that, from and after the passing of this Act, it shall be lawful for the council of any borough named in the said schedules to execute from time to time any deed or obligation in the name of the body corporate whose council they are, for securing re-payment and satisfaction of any debt or obligation contracted by or on behalf of the said body corporate before the passing of the said Act for regulating corporations." Here, the corporation, after the passing of the 5 & 6 Will. IV. c. 76, and before the passing of the 6 & 7 Will. IV. c. 104, borrow money of the plaintiff for the purpose of paying an old debt, giving him this bond by way of security. Under the last-mentioned Act they might have given the bond to the original creditor,

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and then no question could have arisen. The 28th section of the 7 Will. IV. & 1 Vict. c. 78—reciting that by the 6 & 7 Will. IV. c. 104, it is enacted “that it shall be lawful for the council of any borough named in the schedules A. and B. annexed to the 5 & 6 Will. IV. c. 76, to execute from time to time any deed or obligation in the name of the body corporate whose council they are, for securing re-payment and satisfaction of any debt or obligation contracted by or on behalf of the said body corporate before the passing of the said Act for regulating corporations,” enacts “that any money borrowed by any such council for the purpose of being applied, and which shall be actually applied, in or towards satisfaction and discharge of any such pre-existing debt or *obligation, shall be deemed and taken to be, within the true intent and meaning of the said Act of the last session of Parliament (6 & 7 Will. IV. c. 104), a debt contracted by or on behalf of such body corporate before the passing of the said Act for regulating corporations.” If that provision is retrospective, there is an end of the question.

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(MAULE, J. : The 28th section of the 7 Will. IV. & 1 Vict. c. 78, is merely an extension of the 1st section of the 6 & 7 Will. IV. c. 104 ; and that applies only to cases arising after the passing of that Act. As soon as the 20th of August, 1836, arrived, the corporation might lawfully give a bond for securing a debt contracted by them before the passing of the 5 & 6 Will. IV. c. 76. But this bond was given before that date.)

The Municipal Corporation Reform Act does not take away the right of the corporation to execute a bond.

(MAULE, J. : If you are right in that, we need not embarrass ourselves with the other questions.)

There may, no doubt, be a difficulty in enforcing the judgment, inasmuch as the borough fund could not be made available to pay it: see *The Attorney-General v. Aspinall* (1). Still it is submitted that there is nothing in the 92nd section to prevent the corporation from entering into such a contract. The sixth plea, to the third count, is clearly a mere argumentative denial that the corporation received the money to the use of the plaintiff. If it should appear that the money was obtained by them in pursuance of an illegal agreement, that would arise under Not guilty.

(1) 45 B. R. 142 (1 Keen, 513; 2 My. & Cr. 613).

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(MAULE, J. : The defendants say the bond is void, that it is given upon a consideration which has failed.)

Bramwell, contra :

The authorities are numerous to show that the 7 Will. IV. & 1 Vict. 78, s. 28, is not *retrospective.

[To this the whole COURT assented.]

The object was, to allow the corporation to do something which before they could not do. Then, this is not an instrument that can be enforced against the corporation, inasmuch as it is given to secure a debt which the borough fund is not liable to the payment of. It may seem strange to say that a corporate body, having a corporate seal, cannot bind themselves by a bond. But it is submitted that they have no more authority to borrow money than have overseers or surveyors. All property of the corporation must be equally exempted from the payment of debts. There can be no reason why the Legislature should make any distinction in this respect between property which produces profit and that which produces none.

(MAULE, J. : The corporation might clearly sell any chattels they possessed. Might they not also be taken in execution ?)

Clearly not. No property of the corporation could lawfully be applied to the payment of this debt. The Court cannot give judgment against the defendants in this action, because such judgment would be attended with consequences which the Legislature has declared shall not ensue. A corporation cannot anticipate its future means, be they what they may. In *Reg. v. The Town Council of Lichfield* (1), the Court of Queen's Bench quashed an order of the town council for the payment of a debt secured by the mayor's promissory note, for a sum of money borrowed for the purpose of paying debts of the corporation incurred since the passing of the 5 & 6 Will. IV. c. 76.

(TALFOURD, J. : The question there was as to the applicability of the borough fund.)

As to the point of form, the sixth plea, it is submitted, is a good plea, inasmuch as it confesses and avoids ; it shows the bond declared on to be *that the contract is an unlawful one, the defendants have confessed the receipt of so much money, and then the plea is bad.

Peacock, in reply, was stopped by the COURT.

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MAULE, J. (1) :

I am of opinion that this bond is a good and valid bond. As to what property may be taken in satisfaction of the judgment in this case, or what may be the difficulties in the way of enforcing it, these are matters which we are not now called upon to consider. The only question at present before the Court, is, whether the plaintiff shall recover, or whether he shall take nothing by his writ. I see nothing in the Municipal Corporation Reform Act to render this bond invalid. It is conceded that it would have been valid before that Act. The 92nd section creates a "borough fund," which is to consist of the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities, belonging or payable to the body corporate, or to any member thereof in his corporate capacity, and of all fines or penalties for offences against the Act the application of which had not already been provided for; and, on failure of these several sources of revenue, the borough fund is to be made up by a rate imposed upon the inhabitants. It then goes on to direct what expenses shall be paid out of the borough fund, and concludes with a provision that nothing therein contained shall be construed to render any part of the real or personal estate of the corporation liable to the payment of any debt contracted by the corporation before the passing of the Act. The bond in question was given for money borrowed by the corporation after the passing *of the Act. It does not, however, follow that the bond cannot be enforced. It does not follow that the corporation may not have property which is not directly affected by s. 92, and which is at their disposition independently of the Act: and I see no reason why property which might be charged or disposed of at the will of the corporation, might not be subject to an execution for the purpose of satisfying a judgment on this bond. Assuming it, therefore, to be true that the fact that no execution could issue upon a judgment if obtained, might be pleaded in bar, it seems to me that there is a total failure of any ground being shown for the argument that has been urged on the part of the defendants. I therefore think that the bond is a good one, and consequently it follows, as has been very properly conceded, that the pleas are bad, and that there must be judgment for the plaintiff.

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(1) Wilde, Ch. J. was absent.

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THE MAYOR, I am of the same opinion. Considering the powers which
&C., OF corporations possessed before the passing of the 5 & 6 Will. IV.
GRAVESEND. c. 77 [*sic*], I cannot see anything in that Act to prevent them from
executing an instrument of this nature. The simple question for us
to determine, is, whether this is a legal bond upon which the obligee
may maintain an action. I agree with my brother MAULE in thinking
that it is, and therefore that the plaintiff must have judgment.

TALFOURD, J.:

I am entirely of the same opinion. It is not contended that this
bond would not have been valid at common law: but we are asked
to infer that it is invalid by reason of the provisions contained in
the 92nd section of 5 & 6 Will. IV. c. 77 [*sic*]. Giving to the
argument urged on the part of the defendants its fullest effect, it
merely raises difficulties in the way of the plaintiff in enforcing the
judgment. Whether the *plaintiff can obtain the fruits of his judg-
ment by an execution or by a *mandamus*, the bond is clearly a valid
bond, and our judgment must, *valeat quantum*, be for the plaintiff.

Judgment for the plaintiff.

1850.
June 11.

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SERRELL v. THE DERBYSHIRE, &c., RAILWAY COMPANY.

(9 C. B. 811—830; S. C. 19 L. J. C. P. 371.)

A., B., and C., three directors of a Railway Company, in fraud of the
Company, drew a cheque upon the Company's bankers in favour of one of
their body. This cheque, though bearing the stamp usually impressed
upon documents issued by the Company, and countersigned by the secretary,
did not upon the face of it purport to be drawn on behalf of the Company,
nor did the drawers describe themselves therein as directors: Held, that the
Company were not liable for the amount to a *bonâ fide* holder for value (1).

THIS was an action of assumpsit. The first count of the declara-
tion was on a banker's cheque alleged to have been drawn by the
defendants on Messrs. Hankey, payable to Daniel Turton Johnson,
for the sum of 420*l.*, and by him transferred to the plaintiff, who
sued as lawful bearer of the same.

There was also a count upon an account stated.

The defendants pleaded, to the first count, first, that they did
not make the cheque, *modo et formâ*; secondly, that the cheque

(1) See *London and County Banking* of the Bills of Exchange Act, 1882.—
Co. v. Groome (1881) 8 Q. B. D. 288, J. G. P.
293, 51 L. J. Q. B. 224, and s. 36 (3)

was not duly presented for payment; thirdly, that the defendants had not due notice of the non-payment of the cheque; fourthly, that the cheque was delivered to Daniel Turton Johnson by the directors of the Derbyshire, Staffordshire, and Worcestershire Junction Railway Company, for remuneration to him as a director of the said Company, but that no determination as to such remuneration was ever come to by the said Company at a general meeting thereof, and that the plaintiff took the cheque with notice of these facts; fifthly, a similar plea to the fourth, but, instead of alleging that the plaintiff took the cheque with notice, alleging that he took it after the expiration of a reasonable time for presenting it for payment; sixthly, a similar plea to the fourth, but, instead of alleging that the plaintiff took the cheque *with notice, alleging that he was the bearer thereof without value; seventhly, a similar plea to the fourth, but, instead of alleging that the plaintiff took the cheque with notice, alleging that he took it on certain terms and conditions which he had violated; and, to the last count, eighthly, that they did not promise *modo et forma*.

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The plaintiff joined issue on the first, second, third, and eighth pleas, and replied *de injuriâ* to the fourth, fifth, sixth, and seventh.

The cause came on to be tried before Wilde, Ch. J., at the sittings in London after Michaelmas Term, 1848, when a verdict was found for the plaintiff for the amount of the cheque and interest, subject to the opinion of the Court upon the following case, power being reserved to the Court to draw any inference or conclusion from the evidence which a jury might have drawn at *Nisi Prius*, and to consider the questions as to the admissibility of evidence as reserved at the trial:

The following is a *fac simile* of the cheque, and of the stamp or mark thereon impressed; and it was agreed between the parties that the original cheque should, if required, be produced by the plaintiff to the Court. The cheque was not under the common seal of the Company.

“LONDON, August 13, 1847.

“Messrs. HANKEY,

“Pay Daniel Turton Johnson, Esq.,
or bearer, four hundred and twenty pounds.

“420*l.* 0*s.* 0*d.*

“J. M. MATHEW.

“W. KING.

“E. J. SPIERS.

“R. S. MACKENZIE, Sec.”



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The date stamp impressed upon the cheque was put upon all the documents of the Company.

Upon the trial, on the part of the plaintiff, the Act of Parliament establishing the Company was produced, and the same was to be considered as forming part of the case, and was to be referred to by either side upon the argument. The Act received the Royal assent on the 2nd July, 1847.

The Company had been in existence for the purpose of obtaining the Act for about two years previously; and the parties whose names appear as the drawers of the cheque, as well as Daniel Turton Johnson, the payee, had been directors of the Company during the whole of that time, and were such directors when the cheque was made. The Act nominated five persons as the first five directors of the Company, viz., Sir John Foster Fitzgerald, Daniel Turton Johnson, William King, John Mee Mathew, and Edmund John Spiers, and incorporates with it the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16.

The cheque mentioned in the declaration was produced; and, after the evidence hereafter mentioned, after proof of the handwriting of the three persons whose names were subscribed as drawers, and of Mackenzie, the secretary of the Company, was read.

The evidence of the circumstances under which the cheque was drawn, was to the following effect:

The three persons by whom the said cheque is drawn were three of the directors of the said Company, as before mentioned.

The first general meeting of the proprietors was held on the 29th of December, 1847.

Upon the 13th of August, 1847, a meeting took place of the five directors before mentioned, viz., Sir John Foster Fitzgerald, Daniel Turton Johnson, William King, John Mee Mathew, and Edmund John Spiers; *and at that meeting a resolution was entered into that each attending director should receive remuneration for his services prior to the passing of the Act; and a certain sum was agreed to be appropriated to the purpose of such remuneration. There were twenty-five directors. The number of meetings which had been held was ascertained, and the whole twenty-five directors counted as having attended such meetings; and the amount appropriated as the remuneration was then divided amongst the five directors who actually attended: and, by this arrangement, 600 guineas was appropriated to the chairman, and 400 guineas to each of the other four directors; and the cheque upon which this

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action is brought was one of those drawn under the above arrangement as the remuneration to be paid to Daniel Turton Johnson, one of the directors.

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Edmund John Spiers, one of the five directors who attended the meeting at which the before mentioned resolution was adopted, objected to the proceeding altogether; but the chairman, who was also counsel for the Company, advised the directors that the proceeding was perfectly legal; and the resolution was therefore adopted. Spiers then objected to the amount, and stated that he could produce instances of Companies that were paying dividends, in which the remuneration to the directors was less than the amount then proposed to be allowed; but the other directors insisted that the proposed sum was inadequate as a compensation for the trouble they had taken. Some other allowances were also made to the directors for expenses. Four other cheques were drawn at the same time in favour of the four other directors. Spiers received his cheque, because he was told, that, if he did not, the other directors would divide the amount appropriated to him, and the Company would gain nothing by his not taking it.

At the time the cheques were drawn, the Company *had no funds to pay them, and it was agreed that the cheques should not be presented until the bankers should have funds wherewith to pay them; and that, whenever that time should come, all the cheques should be presented together, so that no one should have an unfair start.

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A call was made prior to the general meeting which was held on the 29th of December, 1847. The previous payment of the call was a necessary qualification to attend such meeting.

Before the day of meeting, in order to qualify the directors to attend the meeting, credit was given to them as having paid the amount of the call due by them respectively; but in fact no such payments were made, but the amounts of such call were credited as a remuneration to the directors in respect of their services during the six months between the passing of the Act and the date of the general meeting.

The cheque in question was presented for payment by the bankers of the plaintiff on his behalf on the 6th of October, 1847, when it was dishonoured; and notice of dishonour was given to the Company on the 7th of October.

The evidence on the part of the plaintiff, of the consideration given by him for the cheque, and in explanation of the delay that

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had been incurred in the presentment, was to the following effect, that the cheque was seen in the plaintiff's possession, by his clerk, the latter end of August, 1847; that Johnson, the payee of the cheque, in August, requested the plaintiff not to present the cheque, saying to the effect that he had promised the directors it should not be presented. The witness could not say it was not mentioned in the plaintiff's presence that the cheque was given for remuneration to the directors.

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A letter from Johnson to the plaintiff was read in *evidence, stating that the plaintiff must not pay in the cheque until Johnson should tell him to do so; that Johnson would be at the board that day, and hoped an arrangement would be made for payment; that the calls were responded to slowly, but surely; that Johnson relied on the plaintiff keeping his cheque until he (Johnson) should have seen the directors.

The defendants' counsel objected to the reception of the evidence of the above-mentioned communications between Johnson and the plaintiff: and the evidence was received subject to the objection.

An indenture of mortgage was given in evidence, dated the 5th of November, 1846, between the plaintiff and Johnson, reciting a loan of 2,000*l.* by the plaintiff to Johnson, and assigning certain securities for such loan, and containing a covenant to pay the amount and interest on or before the 8th of May, 1847.

The several following cheques drawn by the plaintiff upon his bankers, payable to Johnson, were read in evidence:

23rd August, 1847. Cheque for 69*l.* 10*s.* This cheque was received by Johnson, and paid by the plaintiffs' bankers.

18th August, 1847. Cheque for 120*l.* This cheque was proved to be in Johnson's possession on the 18th of August, 1847, and to have been paid by the plaintiffs' bankers.

26th August, 1847. Cheque for 100*l.* This cheque was also proved to have been given to Johnson on its date, and afterwards paid by the plaintiffs' bankers.

Evidence was also given of several requests by Johnson to the plaintiff not to present the cheque, accompanied by statements that it was the wish of the directors that the cheque should not be presented at present. This evidence was objected to, and received in manner before stated.

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It was also proved that other moneys and cheques had passed between the plaintiff and Johnson; and applications by the plaintiff

to Johnson for payment of the mortgage were proved to have been made before the receipt of the cheque in question.

It was proved by Messrs. Hankey & Co.'s clerk that the three persons who signed the cheque in question had no joint account at Messrs. Hankey & Co.'s; that the Company had an account; and that cheques to the extent of fifty or sixty, drawn by three of the directors of the Company, had been paid by the bankers on account of the Company (1). This evidence was also objected to, and received subject to the objection.

If the Court should be of opinion that the plaintiff was entitled to recover, a verdict was to be entered for him for the amount of the cheque and interest: otherwise, a nonsuit was to be entered.

Byles, Serjt. (with whom was *Simon*), for the plaintiff:

The questions raised upon this case are, *first, whether the directors of this Company had power to draw cheques at all; secondly, whether this cheque purports to be the cheque of the Company; and, thirdly, whether the plaintiff was a holder for value, and without notice of any fraud or illegality. In the first place, it is submitted that the directors clearly had power to draw cheques. This depends upon the construction of the local Act, 10 & 11 Vict. c. cx. * * *

(*Hill*, *contrà*, observed that he would not dispute the power of the directors to draw cheques for the lawful purposes of the Company, provided it were done under circumstances which would justify it.)

The cheque is countersigned by the secretary of the Company, and bears the seal of the Company; and it is drawn upon the bankers of the Company, with whom the three directors who signed the cheque had no account. There is nothing upon the face of the instrument to denote that it was not drawn on account of the ordinary business of the Company. *It appears that a mortgage-deed had been executed for a larger demand than the amount of the cheque. The plaintiff is a holder for value and without notice that the cheque was given for any illegal purpose; for he had a right to assume that the directors were acting within the limits of their authority. The most recent case upon the subject is that of *Rothschild v. Corney* (2). * * That case is still law, with this qualification, that the true question is whether the person receiving the instrument has become identified with the fraud, not whether he used "due

(1) These words were added to the case at the suggestion of the COURT.

(2) 33 R. R. 209 (9 B. & C. 388).

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caution" or not. The cheque was drawn in August, 1847. There was no evidence as to the time when it came into the plaintiff's hands; though it was seen in his possession in the month of August. The fact of the presentment being postponed until the 6th of October was no proof of fraud on the plaintiff's part; neither was the fact of the presentment having been postponed at the instance of the directors. A cheque may be presented at any time, provided the drawer sustains no loss from the delay in presenting it: *Serle v. Norton* (1), *Alexander v. Burchfield* (2), *Robinson v. Hawksford* (3).

M. D. Hill (with whom was *Wordsworth*), *contra* :

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The main question is whether this was the cheque of *the Company. A subordinate question is, whether, following the rule as to bills of exchange and promissory notes, the plaintiff is not precluded from recovering, on the ground that the cheque was received by him so long after its date, and its presentment postponed for an unreasonable period.

To entitle the three persons who signed this cheque to bind the Company, they must have had authority to draw cheques on behalf of the Company, and they must have executed that authority. It may be conceded that the directors had authority generally to draw cheques for the purposes of the Company. But, had these three persons authority to draw this cheque? The mode in which, and the exceptions subject to which, the powers of the Company are to be exercised by the directors, are defined by ss. 90 and 91 of the 8 & 9 Vict. c. 16; and the 97th section regulates the making of contracts on behalf of the Company. The facts disclosed by the case show that the drawing of this cheque was the result of a gross conspiracy. It does not appear when the date stamp was put upon the cheque. But, assuming that it was there when the signatures were attached to the instrument, it makes no difference. [He cited *Bult v. Morrell* (4), *Beckham v. Knight* (5), and *Beckham v. Drake* (6).]

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No extrinsic evidence is admissible for the purpose of adding a party to a bill of exchange: *Emly v. Lye* (7). The parties who signed the cheque may be liable personally, *Thomas v. Bishop* (8); *Sifkin v. Walker* (9); *Leadbitter v. Farrow* (10), but they clearly had

(1) 2 Moo. & Rob. 401.

(2) 3 Scott, N. R. 555; 1 Car. & M.
75.

(3) 9 Q. B. 52.

(4) 54 R. R. 681 (12 Ad. & El. 745).

(5) 44 B. R. 704 (4 Bing. N. C. 243).

(6) 60 R. R. 678 (9 M. & W. 79).

(7) 13 R. R. 347 (5 East, 7).

(8) 2 Stra. 955.

(9) 11 R. R. 715 (2 Camp. 306).

(10) 17 R. R. 345 (5 M. & S. 345).

no power to *bind the Company. The fact of the special Act being declared to be a "public Act," does not make it notice to all the world that the persons therein named as directors are so: *Brett v. Beales* (1). And, supposing it were notice, of what particular fact is it notice? That the directors had power to draw cheques on behalf and for the purposes of the Company; not that this was a cheque drawn within the scope of their authority. Then, this cheque having been taken after its maturity, for, a cheque is like a bill payable at sight, the plaintiff took it subject to its equities in the hands of the person from whom he received it: *Bayley on Bills*, 6th edit. 165, 166.

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Byles, Serjt., in reply :

No doubt the directors were guilty of a gross fraud in misappropriating the funds of the Company as they did: but that will not affect the title of the plaintiff, a *bonâ fide* holder for value. They are general agents to do all acts connected with the business of the Company: and, in the absence of anything to show they had a more limited authority than they assumed to exercise, the plaintiff was fairly entitled to suppose that they had not exceeded it: *Story on Agency*, §§ 17, 18, 19. The circumstance of the cheque having been taken after its date makes no difference. The holder is not bound to present it immediately.

(CRESSWELL, J. : In *Down v. Halling* (2), HOLROYD, J., says: "A cheque is payable immediately, and the holder of it keeps it at his peril, and a person taking it after it is due, takes it also at his peril. Now, in this case, the cheque had been due five days at the time when it was taken by the defendants. That was a circumstance which ought to have excited their suspicion. I think that when the *defendants took the cheque, more than a reasonable time for presenting it for payment had elapsed, and therefore they took it at their peril.")

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That was the case of a lost cheque; and it is not consistent with the subsequent case of *Rothschild v. Corney* (3).

(MAULE, J. : I think the two cases may be reconciled. There is no such strict rule of law as to cheques, that they must be presented promptly. But, where a reasonable time has passed, they stand in this respect upon the same footing as bills of exchange.)

(1) 34 R. R. 499 (*Moo. & Mal.* 416, 421).

(2) 4 B. & C. 330; 6 Dowl. & Ry. 455.

(3) 33 R. R. 209 (9 B. & C. 388).

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MAULE, J. (1):

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In this case some questions of law and of fact are submitted to the Court, and there are several issues joined between the parties: but, in the view the Court is disposed to take of the case, it will not be necessary to enter very minutely into all of them. The first issue is, whether the cheque declared on was made by the defendants. In order to prove the affirmative of that issue, a paper is produced, signed by three persons who are proved to have been directors of the Company, and countersigned by a person who is described as, and who we are told was, the secretary of the Company. There was a written date upon the paper, "LONDON, August 13, 1847," and also a stamp which was impressed upon it opposite the names of the three persons who appear to be the drawers, bearing in the centre the same date "August 13, 1847," and round the margin the words "Derbyshire, Staffordshire, and Worcestershire Junction Railway Company." One question is, whether that document upon the face of it purports to be the cheque of the Company. It seems to me that it does not. It does not purport to be drawn by the Company in its corporate character. The persons by whom it is drawn are, in fact, directors of the *Company; but they do not describe themselves as such. There is no mention whatever of the Company, except on the stamp. Looking at the instrument alone, it does not profess to be a document by which the Company purport to direct the bankers to pay money on their account. The directors whose names appear upon it do order the bankers to pay the sum therein mentioned; but, without the aid of extrinsic evidence, we cannot construe the instrument as the cheque or order of the Company. If I saw this document out of Court, I should be at a loss to know the meaning of the stamp. It is not a substitute for signature, like the cross of a marksman. It is not usual or customary to sign a document in this circular form. It looks rather (if one were obliged to construe it) as if this were a document which had passed through the office of the Company on such a day, and received the stamp as a mode of identifying or ear-marking it, as is usual in some offices. But, looking at it without the aid of extrinsic evidence, or conjecture, I am utterly unable to say that this document purports to be a document made by the Company. Now, the evidence is, that all documents issued by the company had this stamp upon them. If so, it must intimate something different from what is suggested on the part of the plaintiff; for, it must be put upon some documents

(1) Wilde, Ch. J., was engaged in the Court of Criminal Appeal.

that are required to be under the common seal of the Company, and therefore cannot be intended to make it an instrument binding on the Company. The other evidence from which it is insisted that we are to infer that this was the cheque of the Company, was, "that cheques to the extent of fifty or sixty, drawn by three directors of the Company, had been paid by the bankers on account of the Company." The form of these, and by whom signed, does not appear. Even if they were in the same form, and signed by the same three directors, and countersigned by the *same secretary, I do not think it would make any difference. Because the Company have sanctioned the payment of some cheques when satisfied of the honesty of the transaction, it by no means follows that they are bound by this confessedly dishonest and disgraceful transaction. Undoubtedly there are cases in which a principal may be bound by the acts of his agent, although he has exceeded or not properly followed his authority. But, here, although the three directors who signed this cheque might have had authority to bind the company by contracts entered into on their behalf, they clearly had not authority to do what they have done here, viz. to cheat the Company. Besides, the document does not purport to be made by any one, or by any set of persons, as agents for, or on behalf of, any one else. I therefore think the defendants are entitled to succeed upon the first issue. Probably this cheque may be considered as in the nature of an overdue bill, and, fraud being shown, the *onus* is cast upon the plaintiff of showing when he took it, and by what means he acquired title to it. It is, however, unnecessary to decide that point upon the present occasion. I think there must be judgment of nonsuit.

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CRESSWELL, J.:

I am of the same opinion. It appears that the parties who drew this cheque had no authority to do so: it was a gross fraud upon the Company whose servants they were. Nor, indeed, do they upon the face of the instrument affect to bind the Company. They sign the cheque with their own names, and do not profess to sign as agents or on behalf of the Company: and I find nothing on the stamp to connect them with the Company. The Company, in fact, never had authorised any person to bind them by such an instrument. It cannot, therefore, in any shape be considered to be their cheque; and no person had any *right to take it as an instrument issued by them. In *Brooks v. Mitchell* (1), PARKE, B., says: "If a

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(1) 9 M. & W. 15, 18.

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promissory note payable on demand is, after a certain time, to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note payable on demand is intended to be a continuing security. It is quite unlike the case of a cheque, which is intended to be presented speedily."

TALFOURD, J.:

I also am of opinion that there ought to be a nonsuit in this case. It is unnecessary for us to do more than consider the first issue, for that disposes of the whole case. I am clearly of opinion that the cheque was not the cheque of the Company. If I were to hazard a conjecture as to what was the intention of the three persons who signed the cheque, I should say that they advisedly did an act of an equivocal character, in contemplation of the hour of peril, hoping that the cheques would be paid without demur, but prepared, in the event of any inquiry arising, to say that they meant to bind themselves personally. There is no evidence that this cheque is drawn in a form that is either sanctioned by the Company or warranted by the Act of Parliament. It is true, it is stated in the case that cheques drawn by three directors had been paid by the bankers on account of the Company. But there is no statement as to what was the form of those cheques. And, supposing they were in the same form as the cheque in question, for anything that appears those were cheques properly so called, and fairly drawn for the purposes of the Company. This cheque, however, and those which were drawn at the same time, were not so drawn; but were drawn in fraud of the Company, and to be paid out of future assets: the case *in terms so finds. It appears to me, therefore, that there is nothing in its form or its substance to show that this cheque was the cheque of the Company. It is enough to say that the plaintiff fails upon the first issue, and consequently that a nonsuit must be entered.

Judgment of nonsuit.

[*830]

IN THE COURT OF EXCHEQUER.

CALDWELL v. DAWSON.

(5 Ex. 1—8; S. C. 14 Jur. 316.)

1850.
Feb. 7.

[1]

An assignment of a policy of assurance as security for a debt, with a proviso for redemption on payment, is a mortgage within the 55 Geo. III. c. 184, Sched. Part 1 (1), and therefore requires an *ad valorem* stamp.

DEBT on an indenture, whereby the defendant covenanted to pay the plaintiff 700*l.* and interest, on the 6th of March, 1847. Plea, *Non est factum*.

At the trial, before Pollock, C. B., at the Surrey Summer Assizes, 1849, the plaintiff gave in evidence the indenture, the material part of which is as follows:

This indenture, made the 26th December, 1846, between Samuel Thomas, (who is hereinafter, for the sake of brevity, styled "the said borrower"), of the first part: George Dawson, of the second part; and Frederick Caldwell, Henry Chilton, and Frederick James Fuller, of the third part. Whereas, by a policy of assurance of the English and Scottish Law Life Assurance and Loan Association, dated &c., the funds of the said association are charged with the payment to the executors, administrators, or assigns of the said borrower, of 1,400*l.* within three months after proof of his decease, subject to the payment of an annual premium of 38*l.* 10*s.*, and to the provisions in the said policy expressed. And whereas the said borrower hath agreed with the said parties hereto of the third part, for the loan of 700*l.*, on the security of an assignment of the said policy, and also by the joint and several covenants of the said borrower *and of the said party hereto of the second part hereinafter contained. Now this indenture witnesseth, That, in consideration of the sum of 700*l.* to the said borrower paid by the said parties hereto of the third part, before the execution of these presents, the receipt whereof the said borrower doth hereby acknowledge, he the said borrower doth by these presents grant, bargain, sell, assign, and transfer unto the said parties hereto of the third part, their executors, administrators, and assigns, all that the said recited policy, and the money thereby insured, on all bonuses, benefit, and advantage to be had or received therefrom, to have, hold, receive, and take the said policy, monies, and premises unto the said parties hereto of the third part, their executors,

[* 2]

(1) See now s. 86 of the Stamp Act, 1891.—J. G. P.

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administrators, and assigns; subject, nevertheless, to the proviso for redemption hereinafter contained. (Here followed a power of attorney, enabling the parties of the third part to receive the amount of the policy.) Provided always, that in case the said borrower, his heirs, executors, or administrators shall pay unto the said parties hereto of the third part, their executors, administrators, or assigns, on the 26th March now next ensuing, the sum of 700*l.*, with interest thereon at the rate of 5*l.* per centum per annum, then the said parties hereto of the third part, their executors, &c. will, at the request and charges of the said borrower, his executors, &c., re-assign the said policy unto the said borrower, his executors, &c. And the said borrower, and, as his surety, the said party hereto of the second part, do hereby for themselves, their heirs, executors, and administrators, jointly and severally covenant with the said parties hereto of the third part, their executors, administrators, and assigns, that they the said parties hereto of the first and second parts, or some or one of them, their, or some or one of their executors, administrators, or assigns, will pay to the said parties hereto of the third part, their executors, administrators, or assigns, the said sum of 700*l.* and interest as aforesaid, on the 26th March next, without any deduction whatsoever; and also will from time *to time during the life of the said borrower, pay the premiums and expenses which ought to be paid for keeping the said policy on foot, or for effecting and keeping on foot any renewed or substituted policy. And in case default shall be made in payment of any such annual premium or expenses, it shall be lawful for the said parties hereto of the third part, and the survivors and survivor of them, and the executors and administrators of such survivor, and their or his assigns, from time to time, as long as any money shall remain secured by these presents, to keep on foot such assurance as aforesaid, and in case of the forfeiture or determination of the said policy, to renew the same policy, or effect a substituted policy with the said society for the like amount upon the life of the said borrower, and to pay the premiums and other expenses thereon. And that the said parties hereto of the first and second parts, their heirs, executors, or administrators, or some or one of them, will, within one calendar month or sooner, on demand thereof, pay unto the said parties hereto of the third part, their executors, administrators, or assigns, all such money as they or he shall expend about such assurance, with interest thereon after the rate of 5*l.* for every 100*l.* by the year; and the said

[*3]

policy or such substituted policy shall be a security for the repayment of the same sums and interest, in addition to the said sum of 700*l.* and the interest thereof, and the costs, charges, and expenses occasioned by the non-payment thereof; but so, nevertheless, that the total amount of principal money to be ultimately recoverable under these presents shall not exceed the sum of 700*l.*; and also that the said borrower will not do any act or commit any default whatsoever by means of which the said recited policy or any substituted policy shall be impeached or become void or voidable, or by reason whereof any higher rate of premium may become payable thereon, &c.

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This indenture was stamped as a deed with a 1*l.* 15*s.* stamp. It was objected, on behalf of the defendant, first, *that this was an assignment by way of mortgage of the policy of assurance, and therefore required an *ad valorem* stamp under the 55 Geo. III. c. 184, Sched. Part 1, "Mortgage;" secondly, that there was a variance, inasmuch as the covenant contained in the indenture was not an absolute covenant on the part of the defendant to pay, but a collateral covenant, that the party of the first part or the defendant would pay, and that debt would not lie on such a covenant. The learned Judge directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a nonsuit.

[*4]

Peacock, in the following Term, moved upon both objections; but the Court, after referring to the case of *Caldwell v. Becke* (1), refused the rule upon the last point, and granted it upon the first.

Martin and Wordsworth now showed cause :

As between the plaintiff and the defendant, who is a surety, this instrument is a mere covenant to repay the 700*l.* with interest, and is, therefore, properly stamped as a deed : *Walmesley v. Brierly* (2). It is said that the assignment of the policy of assurance renders it a mortgage within the Stamp Act; but such a policy is only an engagement on the part of the association, in consideration of an annual payment by the assured, to pay to his representatives a certain sum after his decease. That is a mere chose in action, the equitable right to which can alone be assigned, and upon which any action must be brought in the name of the assignor. It is not "lands, estate, or property, real or personal, heritable or moveable," within the terms of the 55 Geo. III. c. 184, Sched.

(1) 76 R. R. 613 (2 Ex. 318).

(2) 1 Man. & Ry. 529.

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[*5]

Part 1, "Mortgage." A judgment debt is a more effective description of property than a policy of assurance, inasmuch as the judgment creditor may take either the person or property of his debtor in execution; yet it has been expressly decided that an assignment by indenture of *a judgment debt is not an assignment of property, within the 55 Geo. III. c. 184, Sched. Part 1, "Conveyance:" *Warren v. Howe* (1). Where a policy of assurance on goods, on a voyage to India, was assigned as a security for the payment of an annuity, that was held not to be a conveyance of property within the meaning of the same Act: *Blandy v. Herbert* (2). In the case of *Coates v. Perry* (3), several debtors conveyed their goods and effects to trustees, in trust to sell, and with the proceeds to discharge, first, debts due to the trustees, then debts due to other creditors, with a resulting trust for the original debtors; and it was held, that such deed did not require a stamp as upon a "conveyance" or "mortgage." Even assuming that a policy of assurance is "property" within the meaning of the Stamp Act, it is an established rule, that, where a deed has a double operation, its principal object must be looked at, with reference to the stamp: *Corder v. Drakeford* (4), *Price v. Thomas* (5). The principal object of this deed was to secure the repayment of the loan, and the defendant had no interest whatever in the policy.

Douglas, in support of the rule:

In *Warren v. Howe* (1), the transaction, which was, in point of fact, a mortgage, was held not to be a conveyance within the Schedule, tit. "Conveyance," because the words "other property" were restricted to property *ejusdem generis*, that is, property which could be the subject of a sale. The Schedule, tit. "Mortgage," contains the words "affecting any lands, estate, or property real or personal whatsoever; so that the word "property" under that head cannot be construed as property *ejusdem generis*. A policy of assurance is property within that clause, which comprehends everything which may be the subject of a mortgage. (He referred to *Horsfall v. Hey* (6).)

[6]

POLLOCK, C. B.:

The rule must be absolute. If there were any decided case in

(1) 2 B. & C. 281

(2) 9 B. & C. 396.

(3) 6 Moore, 188.

(4) 3 Taunt. 382.

(5) 36 R. R. 550 (2 B. & Ad. 218).

(6) 76 R. R. 782 (2 Ex. 778).

point, that might be considered as a judicial exposition of the law which would bind us ; but I can find none.

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PARKER, B. :

I am of the same opinion. If I were called upon to construe, for the first time, this clause in the Stamp Act, I should say that the instrument in question would fall under the description of a mortgage affecting personal property. The language of the statute is very wide, embracing every description of property ; and if we are not fettered by any previous decision, it seems to me impossible to say, that a policy of assurance, being a valuable article of sale, is not “property” within the meaning of that Act. The question then is, whether there has already been any satisfactory decision on the subject. Now, *Warren v. Howe* (1), which has been relied on, was the case of an assignment by indenture of a judgment debt, not by way of sale, but upon trust to pay the expenses of the assignment, and of enforcing payment, and then to pay the assignee the amount of his debt, and the residue to the assignor. It was argued by counsel, that the instrument fell within the description of a “conveyance,” or, if not, within that of a “mortgage.” Lord TENTERDEN disposed of the latter objection by saying, that it did not fall within that clause, because it was not a conveyance of property in trust for sale. It is clear, therefore, that the only point to which Lord TENTERDEN’s attention was addressed was, whether the instrument fell within the clause of sale ; and he says, that the expression “other property” in that clause, “applies only to property of the same description as that previously mentioned, viz. such property as is usually the subject of sale, and may be converted into money.” The case of *Blandy v. Herbert* (2) may be explained in the same way. There also there were two questions ; in the first place, whether the transaction described in the deed *could be considered as the sale of an annuity ; and the Court thought there was no pretence for that. With respect to the other point, Lord TENTERDEN says, “I am of opinion that the policy (no loss having occurred) cannot be considered property, within the meaning of the 55 Geo. III. c. 184, Sched. Part 1.” So that his attention was not at all directed to the case of a mortgage. That being so, we are not, in the present case, concluded by either of those decisions, and, viewing the clause itself, I have no doubt that it was meant to comprise every description of property conveyed by way of mortgage.

[*7]

(1) 2 B. & C. 281.

(2) 9 B. & C. 396.

CALDWELL ALDERSON, B. :

DAWSON.

I am of the same opinion. A policy of assurance is "property" in the ordinary sense of the word. It certainly would pass by a devise of all the testator's property; and if so, it is a strong assertion to say, that it is not "property" within the Stamp Act. In the case of *Warren v. Howe* Lord TENTERDEN seems to have thought that the expression "other property" applied only to such property as could be transferred at law from a seller to a purchaser. Whether that opinion is correct is not the question now before us; but it would be strange if the Stamp Act was not intended to apply to the transfer of an equitable interest in land. Certainly the words under the head "Conveyance" in the schedule ought not to be construed so strictly, for they speak of "right, title, or interest in property." But the mortgage clause is not within the difficulty which prevailed in Lord TENTERDEN's mind, for that imposes the duty on any property that may be affected by the mortgage. There is no doubt that the property here can be affected by the mortgage, and consequently the instrument requires a stamp within the very words of the Act.

ROLFE, B. :

[*8]

I am of the same opinion, though reluctantly; for I regret that such an objection should prevail when the parties, perhaps, meant to do right, but were misled by the *marginal note in *Warren v. Howe*. That case seems to have proceeded on the ground that a judgment debt was not the ordinary subject of a sale. Lord TENTERDEN says, that the assignment in that case was not a "mortgage," for it was not a conveyance of property in trust for sale. Whether that is right or not we need not now inquire. He also says, that the assignment was not a "conveyance," because that clause refers to such property as is usually the subject of sale, and that a judgment debt is not; and so he concludes that the assignment did not come within either of those descriptions of instruments which require an *ad valorem* stamp. Notwithstanding that decision, I must own, that if ever I should be the purchaser of a judgment debt, or of a policy of assurance, I should insist upon having it stamped with an *ad valorem* duty.

Rule absolute.

THOMAS v. THOMAS.

(5 Ex. 28—34; S. C. 19 L. J. Ex. 175; 14 Jur. 180; 1 L. M. & P. 229.)

1850.
Feb. 7, 15.

[28]

An action for money had and received will not lie by one tenant in common against his co-tenant, who has received more than his share of the profits.

ASSUMPSIT for money had and received to the plaintiff's use.
Plea, *Non assumpsit*.

At the trial, before Rolfe, B., at the last Herefordshire Summer Assizes, it appeared that the plaintiff and one Benjamin Thomas, the defendant's late husband, were entitled, under the will of one Alice Thomas, to certain premises as tenants in common; but that Benjamin Thomas, for some time previously to his death, in February, 1848, received the whole rent. It was admitted that the plaintiff was entitled to half of the rent, as such tenant in common, and the present action was brought to recover the moieties of five years' rent. On the part of the defendant, it was objected that this form of action would not lie by *one tenant in common against his co-tenant; and a verdict was taken by consent for the plaintiff, leave being reserved for the defendant to move to enter a nonsuit.

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A rule *nisi* having been obtained accordingly,

Whateley and *W. H. Cooke* showed cause (Feb. 7) :

There is no objection to this form of action. At common law, the action of account lay only against a guardian in socage, a bailiff, or receiver: 2 Inst. 379; or as between merchants; but it lay not between tenants in common, unless he who was charged had been constituted bailiff: Co. Litt. 172 a, Com. Dig. "Accompt," (A 4), Arch. N. P. 196, Sel. N. P. 2. The 4 Anne, c. 16, s. 27 (1), passed to enable one tenant in common to sue the other where he had not been appointed bailiff. It provides, that actions of account "shall and may" be brought by one tenant in common against the other, as bailiff, for receiving more than comes to his just share or proportion. That was an enabling statute, and did not deprive the parties of any other remedy they might have. In many cases an action of account and also of assumpsit will lie. It is laid down in Brooke's Abr. "Accompt," pl. 20, on the authority of the Year Book, 47 Edw. III. 22, that if two are jointly possessed of a chattel, and one of them sells it, an action of account will lie against him for the other's share of the money. That position having been

(1) 4 & 5 Anne, c. 3, s. 27, in the Statutes Revised.—J. G. P.

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cited in *Wheeler v. Horne* (1), WILLES, Ch. J., said, "I should think that not only an action of account, but even an action on the case for money had and received, might be well brought against him for it." In Viner's Abr. "Account," (A), pl. 12, there is cited a case of *Hamond v. Ward*, "which was error to reverse a judgment in an *insimul computaverunt*, and assigned that the action was brought against him for rent as tenant of the land, and not as receiver; and therefore, account did not lie; but ROLLE, Ch. J., said, "It *appears here that the action is brought against the defendant as receiver; and if one receives my rents without my consent, I may have either debt or account against him; and affirmed the judgment." In *Wilkin v. Wilkin* (2), which was an action of assumpsit, the plaintiff declared "that the defendant intending to go beyond sea, he delivered him a box and goods, which the defendant promised to dispose of for him, and to give him an account thereof at his return. Defendant pleaded in abatement, that he was the plaintiff's bailiff, and merchandised the said goods, and that he ought to bring account, and not an action on the case, *non allocatur*; for, the action being grounded on an express promise, assumpsit lies as well as account, and the plaintiff has his election; et per HOLT, there is some inconvenience in giving a long rambling account in evidence to a jury; but whenever one acts as bailiff, he promises to render account." DOLBEN, J. (3): "Case lies, because an action of account is a tedious and troublesome action." The case was adjourned, and ultimately the COURT gave judgment of *respondeat ouster* (4). In Bacon's Abr. "Accompt," (C), citing Brooke's Abr. "Accompt," pl. 35, it is said, "An action of accompt lies not for a thing certain, as if a man delivers 10*l.* to B. to merchandise with, he shall not have account of the 10*l.* but of the profits, which are uncertain." In Viner's Abr. "Account," (A), pl. 12, it is laid down, that "no account lies for rent reserved upon a lease for years," because it is a thing certain.

[*31]

(PARKE, B.: There is this *Anonymous* case in 11 Mod. 92, which illustrates the subject: "POWELL, J.: "If I give money to another to buy goods for me, and he neglects to buy them, for this breach of trust I shall have election to bring debt or account; and cited four or five cases. HOLT, Ch. J., *contra*: If the party did not take it as a debt, but *ad computandum*, or *ad merchandizandum*, it must be an account, *and he shall have the benefit of an accountant,

(1) Willes, 208.

(2) 1 Salk. 8; Show. 71.

(3) Comb. 149.

(4) Carth. 89.

which is, he may plead being robbed, which shall be a good plea in the last case, but not in the first.”)

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In *Tomkins v. Willshear* (1), GIBBS, Ch. J., says, “The use of the action of account is, where the plaintiff wants an account, and cannot give evidence of his right without it; but if, by subtracting the amount of six articles on the one side from the amount of nine articles on the other, the plaintiff can make out that a balance is due to him even of 50*l.*, it is impossible to say that the action of assumpsit will not lie for that balance.” Here no account is wanted, but the plaintiff’s claim is ascertained by taking half the annual rental for five years. *Goodtitle v. Toombs* (2) decided that one tenant in common may maintain trespass for mesne profits, after a recovery in ejectment, against his co-tenant. That is a stronger case than the present, inasmuch as there the damages were unliquidated, and the jury might, if they thought fit, have given more than the amount of the rent. (They also cited *Sturton v. Richardson* (3), *Baxter v. Hozier* (4), and *Cottam v. Partridge* (5).

Keating and Skinner, in support of the rule:

At common law one tenant in common could not maintain any action against his co-tenant, unless the latter were his bailiff. In Co. Litt. 200 b, it is said, “Although one tenant in common or joint tenant, without being made bailiff, take the whole profits, no action of account lieth against him, for in an action of account he must charge him either as a guardian, bailiff, or receiver, as hath been said before, which he cannot do in this case, unless his companion constitute him his bailiff. And therefore all those books which affirm that an action of account lieth by one tenant in common or joint tenant *against another, must be intended when the one maketh the other his bailiff, for otherwise never his bailiff to render an account is a good plea.” Com. Dig. tit. “Estates by Grant,” (K 8), and Cruise’s Dig., tit. 20, s. 9, are authorities to the same effect. There is good reason why an action for money had and received will not lie by one tenant in common against his co-tenant; for, in the first place, there is no privity between them. In *Clarance v. Marshall* (6), BAYLEY, B., speaking of that form of

[*32]

(1) 5 Taunt. 431.

(2) 3 Wils. 118.

(3) 13 M. & W. 17.

(4) 5 Bing. N. C. 288; 7 Scott,

233.

(5) 4 Man. & G. 271; 4 Scott, N. R. 819.

(6) 2 Cr. & M. 495.

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action, says, "Now that is a species of action in which, if you establish agency clearly, why then you may treat the rents received by your agent as so much money received for your use, but you must make out most clearly that an agency subsisted in point of fact before you can maintain an action for money had and received, which is not an action in which rents received under an adverse holding or possession are recoverable by the rightful owner." A further objection to that form of action is, that it would deprive the co-tenant of his right to deductions, which would be allowed in an action of account. Again, if the receipt by one tenant in common of his companion's share of the profits raised an implied assumpsit, the title to the land might be put in issue in an action for money had and received. *Eason v. Henderson* (1) shows that the only remedy is by action of account.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. :

The question in this case is, whether an action for money had and received lies by one tenant in common against his companion. On the argument, the authorities on the subject on both sides were cited.

[*33]

It appears to us to be clear, from Co. Litt. 200 b, that *by the common law a tenant in common could bring no such action as this. In that page several cases are put in which one tenant in common may bring an action against his companion; but it is there said, that if two be tenants in common of a chattel, and one of them takes it away, the other has no remedy by action, except when the subject-matter is destroyed, but must watch his opportunity to retake it. Several other instances are there put, illustrative of these distinctions; and it is expressly laid down, that no action of account lay by the common law by one tenant in common against his companion for taking more than his share of the profits, unless where he had constituted him his bailiff to receive them. Now this want of remedy by the common law was provided for by the stat. 4 Anne, c. 16, s. 27, which enables one tenant in common to maintain an action of account against the other as bailiff, for receiving more than his due share or proportion; in which case, however, he is entitled to all the rights and indemnities of a receiver, and consequently would be able to show that the money had been

(1) 12 Q. B. 986; 18 L. J. Q. B. 69.

lost without his fault; whereas, in an action for money received to the use of another, the defendant is liable for the money absolutely. It is clear, therefore, that the statute of Anne only gives an action of account, in which the receiver would be entitled to all just allowances; and if so, that this action for money had and received will not lie.

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A question occurred to my mind, which I thought worthy of consideration, namely, whether this action might not lie, on the principle that, where there are tenants in common of a reversion (as, for instance, of a reversion of land let on lease), they may either join in their action for rent, or bring several actions. If a tenant in common can recover a moiety of the rent (as, for instance, supposing the rent to be 40*l.*, that he could recover 20*l.*) there might be a colour for saying that the other could sue him for half of a whole amount wrongfully received. But that is explained *by Lord Holt, in *Midgley v. Lovelace* (1) and *Martin v. Crompe* (2). He says, that where a tenant in common severs in such an action, he cannot recover half the sum *nominatim*, but only half of the rent; thus showing that the rent continues unsevered.

[*34]

It appears to us, therefore, that the case of a tenant in common who receives the whole of the rent due to himself and his companion is analogous to the case of a tenant in common taking the whole of a chattel into his possession; in which case neither trespass nor trover lies against him. The plaintiff's only remedy here is therefore by action of account, and this rule must be made absolute.

Rule absolute.

BUCKLEY v. HANN (3).

(5 Ex. 43—46; S. C. 19 L. J. Ex. 151; 14 Jur. 226; 7 Dowl. & L. 188.)

A clerk in the Admiralty, who, as such, attends daily at an office within the city of London, is not a person who "carries on his business" there within the London Small Debts Act (4), 10 & 11 Vict. c. lxxi.

A bill of exchange was drawn and accepted, and the indorser put his name upon it, within the city of London, but it was delivered to the indorsee in the county of Middlesex: Held, that the cause of action did not arise within the city of London.

1849.
Nov. 26.
1850.
Feb. 8.

[43]

THIS was a rule calling on the plaintiff to show cause why a suggestion should not be entered on the roll, to deprive the plaintiff

(1) Carth. 289.

(2) 1 Ld. Ray. 340.

(3) See *Graham v. Lewis* (1888) 22

Q. B. D. 1, 58 L. J. Q. B. 117; *Read v. Brown* (1888) 22 Q. B. D. 128, 58

L. J. Q. B. 120; and *Kutner v. Phillips* [1891] 2 Q. B. 267, 60 L. J. Q. B.

505.—J. G. P.

(4) Now the City of London Court. See 30 & 31 Vict. c. 142, s. 35.

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of costs, under the London Small Debts Act, 10 & 11 Vict. c. lxxi. (1).

['44]

It appeared from the affidavits, that the action was by the indorsee against the acceptor of a bill of exchange, drawn by one E. Wood, and by him indorsed to the plaintiff, and was tried before the Secondary of London, under a writ of trial, when a verdict was found for the plaintiff *for 12*l.* 4*s.* The defendant, who resided at Greenwich, in the county of Kent, was a clerk in the Admiralty, and, as such clerk, daily attended at the office called "The General Register and Record Office of Seamen," No. 70, Lower Thames Street, in the city of London, and he had no other occupation or business. The plaintiff resided at Edmonton, in the county of Middlesex, and the bill in question was drawn and accepted, and Wood put his name upon it, at the office No. 70, Lower Thames Street, and it was then sent by a messenger to the residence of the plaintiff, who received it there.

J. Brown, in last Michaelmas Term (November 26) showed cause:

First, the defendant did not carry on his business within the city

(1) The following sections were referred to:

Sect. 40. "That such summons may issue, provided the defendant, or one of the defendants, shall dwell or carry on his business within the city of London or the liberties thereof at the time of the action brought; or provided the defendant, or one of the defendants, shall have dwelt or carried on his business therein at some time within six calendar months next before the time of the action brought; or if the cause of action arose therein."

Sect. 112. "That all actions and proceedings which before the passing of this Act might have been brought in any of her Majesty's superior courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where any officer of the Court holden under the provisions of this Act shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the Court, or the proceeds or value thereof, may be brought and

determined in any such superior Court, at the election of the party suing or proceeding, as if this Act had not been passed."

Sect. 113. "That if any action shall be commenced after the passing of this Act in any of her Majesty's superior courts of record, for any cause other than those lastly hereinbefore specified, for which a plaint might have been entered in the Court holden under the provisions of this Act, and a verdict shall be found for the plaintiff for a sum not more than twenty pounds if the said action is founded on contract, or less than five pounds if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless in either case the Judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior Court."

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of London. A clerk, who merely attends at an office in the city, cannot be said to "carry on his business" there, within the meaning of the 10 & 11 Vict. c. lxxi. The word "business" is used in its popular sense, as denoting "trade or business," and it is evident, from the word "dwell," that the meaning of the statute is, that if the defendant shall not reside within the city, it shall be sufficient if he carries on his trade or business there. The words of the London Court of Requests Act, 39 & 40 Geo. III. c. civ., were, "residing or inhabiting within the city of London or the liberties thereof, or keeping any house, warehouse, shop, shed, stall, or stand, or seeking a livelihood, or trading or dealing within the same city or liberties;" and it was held, that a clerk in the Excise Office, who attended at the office in the city for certain hours every day, and who had no other means of obtaining his livelihood, was not a person "seeking a livelihood" in the city, within the meaning of that Act: *Smith v. Hurrell* (1). In *Rolfe v. Learmouth* (2), the Court of Queen's Bench held, that the deputy-sealer of writs in the Court of Chancery, whose duty it was to attend the Lord Chancellor when sitting at Westminster, and affix the Great Seal to instruments, was not a person carrying on his business at Westminster, within the meaning of the County Court Act, 9 & 10 Vict. c. 95.

[*45]

Secondly, under the 10 & 11 Vict. c. lxxi., the whole cause of action must arise within the City of London, which is not the case here. In that respect the 10 & 11 Vict. c. lxxi., differs from the 9 & 10 Vict. c. 95, s. 128, the words of which are, "or where the cause of action did not arise wholly, or in some material point, within the jurisdiction of the Court," &c. This bill was drawn and accepted within the city of London, but was delivered to the plaintiff in the county of Middlesex. There was no complete indorsement until delivery: *Marston v. Allen* (3).

W. L. Thomas, in support of the rule:

It is sufficient if any part of the cause of action arose within the city of London. There is a *prima facie* case which will justify the entry of a suggestion, which may be afterwards traversed: *Butler v. Corney* (4). The defendant had no other occupation, and performed all the duties by which he gained his livelihood within the city of London.

(1) 10 B. & C. 542.

(3) 58 R. R. 785 (8 M. & W. 494).

(2) 14 Q. B. 196; 19 L. J. Q. B. 10.

(4) 2 Ex. 474.

BUCKLEY PARKE, B. :

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The statute requires the cause of action, that is, the whole cause of action, to arise in the city. In this case it did not; until the bill was delivered to the plaintiff, no cause of action arose from the indorsement to him. Upon the other point we will take time to consider.

Cur. adv. vult.

PARKE, B., now said :

[*46] This was an application to enter a suggestion to deprive the plaintiff of costs, and the case depends upon the meaning of the term "carry on business," in the London Small Debts Act, 10 & 11 Vict. c. lxxi., ss. 40, *118. The question was, whether a clerk in the Admiralty, whose duty it was to attend at a place in the city in that department, was a person carrying on business within the limits of the city. A similar question has been under the consideration of the Court of Queen's Bench, with respect to the County Courts Act, 9 & 10 Vict. c. 95, and they have held, that the deputy-sealer of writs in the Court of Chancery is not a person who carries on his business in any definite locality. In like manner, it cannot be considered that a clerk who attends at an office in the city carries on some independent business there, so as to be within the meaning of the Act in question. The rule will therefore be discharged.

Rule discharged.

1850.
Jan. 18.
Feb. 11.

MOSS *v.* HALL AND WIFE.

(5 Ex. 46—50; S. C. 19 L. J. Ex. 205.)

[46]

To an action on a bill of exchange by the indorsee against the executrix of the drawer, the defendant pleaded, that after the bill became due, and in the lifetime of the drawer, it was agreed between the plaintiff, then the holder of the bill, and the acceptor, without the authority or consent of the drawer, "that, for a good and sufficient consideration in that behalf, that is to say, that in consideration that the said J. O. (the acceptor) would, during a certain reasonable time, to wit, during the space of one month from the day and year last aforesaid, use his best endeavours to procure a new and approved negotiable bill of exchange to be taken by the plaintiff if satisfactory to him, in lieu and substitution and for and on account of the said bill, he the plaintiff would, for and during the period aforesaid, abstain from and forbear enforcing payment from J. O. of the said bill by proceedings at law or otherwise." The plea then averred, that in pursuance of the said agreement, the said J. O. did during the said period use his best endeavours, &c., and concluded by alleging, that the plaintiff gave time to the acceptor without the consent of the drawer; and that the drawer had

never ratified the agreement. Verification. Replication, *de injuriâ* : Held, on general demurrer, that the plea disclosed a sufficient consideration for the holder's promise to suspend the action against the acceptor, and that the surety was thereby discharged.

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ASSUMPSIT. The first count of the declaration was by the plaintiff as indorsee of a bill of exchange for 25*l.*, drawn by one W. Vandersteane (to whom the female defendant was executrix), upon and accepted by one James Osborne. Plea (*inter alia*) to the first count, that after the bill became due and payable according to the tenor and effect thereof, and before the commencement of the suit, and in the lifetime of the said W. Vandersteane, to wit, on &c., it was agreed by and between the plaintiff, then being the *holder of the said bill, and the said James Osborne the acceptor, without the authority or consent of the said W. Vandersteane, that for a good and sufficient consideration in that behalf, that is to say, that the said James Osborne would, during a certain reasonable time, to wit, during the space of one month from the day and year last aforesaid, use his best endeavours to procure a new and approved negotiable bill of exchange to be taken by the plaintiff, if satisfactory to him, in lieu and substitution and for and on account of the said bill, he the plaintiff would, for and during the period aforesaid in this plea mentioned, abstain from and forbear enforcing payment from the said James Osborne of the said bill in the first count mentioned, by proceedings at law or otherwise ; and that, in pursuance of the said agreement, the said James Osborne did, during the period last aforesaid, namely, in the space of one month from the day and year last aforesaid, use his best endeavours to procure a new and approved negotiable bill of exchange, to be taken by the plaintiff, if satisfactory to him, in lieu and substitution, and for and on account of the said bill. The plea then averred, that the plaintiff, without the consent or authority of W. Vandersteane, gave time to the said James Osborne, to wit, for the period aforesaid, for the payment of the said bill, and that the said W. Vandersteane never ratified the said agreement. Verification. Replication, *de injuriâ*. Special demurrer.

[*47]

The plaintiff, in his points for argument, stated he should contend that the plea was bad.

The demurrer was argued in last Term (January 18th) by

Lush, in support of the demurrer :

The replication is clearly bad. The plea does not set up any excuse for non-payment by the defendants. The subject-matter of

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the defence, as it appears, arose after the bill had become due and payable. It therefore does not set up matter in excuse for the breach of the promise, but is in the nature of a discharge.

[48]

H. Hill, contra :

The replication cannot be defended; but then the question arises, whether the plea is good. It is bad, on the ground that it does not state any sufficient consideration for the supposed agreement. The agreement, therefore, was not binding upon the principal, and the surety was not released by it. Thus, in *Philpot v. Briant* (1), where the executor of the acceptor of a bill of exchange orally promised to pay the holder out of his own estate, provided the holder would forbear to sue, and, in consequence of that arrangement he did forbear, it was held that, the promise being void, the drawer of the bill was not thereby discharged. Many other authorities might be adduced, which are founded upon that principle.

(PARKE, B.: The consideration might be sufficient, if the party agreed to take substantial trouble in obtaining a new negotiable instrument, and not merely to lie by. In such case personal trouble would be the consideration.)

Lush, in reply :

The plea is good. The question is, whether the plea, upon general demurrer, states a binding agreement. Now it is clear that, in an action upon an agreement, the consideration is sufficient to support the action, where a benefit is conferred upon the defendant, or the plaintiff is put to any inconvenience or trouble. Unless, therefore, it distinctly appears upon this plea that the consideration alleged had no such operation, the plea is good. A fresh negotiable bill may be of great benefit to the one party, and the other party may be put to great trouble in endeavouring to obtain it. The Court cannot say that, under all circumstances, this consideration, and, consequently, the agreement, is a mere nullity.

[*49]

The Court recommended the plaintiff to amend, and the case stood over to give him that opportunity. But *on a subsequent day the plaintiff's counsel stated that the plaintiff would take the opinion of the Court upon the question. The case of *Ford v. Beech* (2) was referred to. And now—

(1) 29 R. R. 710 (4 Bing. 717).

(2) 75 R. R. 632 (11 Q. B. 842,
17 L. J. Q. B. 114).

PARKE, B., (after stating the pleadings,) said :

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The replication was admitted to be bad by the plaintiff's counsel, on the argument of the case ; and the question is, whether the plea is good. We are of opinion that it is. We must assume that the plea does not contain merely a promise or assurance on the part of the acceptor that he would use his best endeavours to procure a new and approved negotiable bill, but a positive contract to that effect ; and as there is such a positive contract, the question is, whether there is any sufficient consideration alleged to make that a binding contract. The law is perfectly settled, that a binding agreement, founded upon a good consideration, for the breach of which an action would lie, entered into by a person with the principal, by which the latter is discharged, discharges the surety also. The question is, whether any such binding agreement is stated in this plea. Now, if the nature of the transaction was such as one is led to suspect it was from the plea, it is highly probable that the jury would negative any such contract. But supposing the contract to have been that which is here pleaded, then comes the question, whether the fact of the acceptor's agreeing with the holder of the bill, that he the acceptor would take trouble in order to obtain a fresh negotiable bill of exchange, although of a smaller amount, would constitute a sufficient consideration upon which to found a binding agreement between those parties. We are of opinion that it does constitute a sufficient consideration. The trouble which a party imposes upon himself may be a good consideration for a promise, and it is not for us *to estimate whether the bargain was a good one or not. An engagement by a person to remunerate the act of another, which benefits the former or puts the latter to any inconvenience or loss, is a binding engagement. We were referred to the case of *Ford v. Beech*, which decides that an agreement to suspend an action is no answer to it. And that is so ; but this is not an agreement to suspend the action against the defendant himself, but it is an agreement to give time to the principal, namely, to suspend the action against him ; and whenever a party's hands are effectually tied up, so that he cannot break such an engagement without being made liable for a breach of it, the surety is discharged, the rule being, that there must be either a new security given to extend the time, or a binding agreement, upon a sufficient consideration, to suspend the remedy. In this case the surety is discharged ; and, as we are of opinion that the plea is good, our judgment must be for the defendant.

[*50]

Judgment for the defendant.

1850
Feb. 15.

HITCHINGS v. THOMPSON AND HOWARD (1).

(5 Ex. 50—55 ; S. C. 19 L. J. Ex. 146.)

[50]

The payment of rent by a tenant to an authorised agent, who pays over the rent to his principal, is evidence as against the tenant of the principal's title, although the agent do not disclose his principal's name at the time.

Where A. had paid rent to B., the agent of C. and D., and the property for which the rent was paid was subsequently conveyed to C. and E., and A. still paid the rent to B., but was not informed by the latter of the change, and B. paid over the rent to C. and E. : Held, that the payment so made was some evidence of the title of C. and E. to the property, and that, under such circumstances, there was no necessity (in an action of replevin by A. against parties claiming under C. and E.) for the proof of the conveyance to C. and E.

REPLEVIN. Avowry by the defendants, alleging that the plaintiff was tenant to them of the house in which the distress was made. Plea in bar, *Non tenuit*.

[*51]

At the trial, before Cresswell, J., at the last Bristol Summer Assizes, it appeared that the distress for rent was levied on the 11th of July, 1847, in a house in the occupation of the plaintiff; that the house originally belonged *to one W. Clarke, who conveyed it upon his marriage to Messrs. Ward and Baynton, as trustees of the settlement. The plaintiff then endeavoured to show, that Baynton having withdrawn from the trusteeship, a Mr. Newman was, by a deed of the 21st of February, 1846, appointed in his place; but the execution of this deed was not proved. Ward and Newman afterwards retired from the trusteeship, and the legal estate in the house was conveyed by the latter trustees to the present defendants. The plaintiff paid the rent to a Mr. Horwood, the receiver and agent of Messrs. Ward and Baynton, and Ward and Newman, during their respective trusteeships. The plaintiff had, on the occasion of each payment, obtained receipts from Horwood in the following form :

“Received, for the trustees of Mr. and Mrs. W. Clarke, of Mr. Hitchings, 5*l.* 5*s.*, being for half a year's rent for the house and premises situate in the parish of St. Philip and Jacob, Bristol, due, &c.

“DANIEL HORWOOD.”

Horwood had paid the money over to Messrs. Ward and Baynton, and Ward and Newman, but the plaintiff did not know of the change of the trustees, or that Horwood was agent for all of them. It was thereupon contended, on behalf of the plaintiff, that the

(1) See *Carlton v. Bowcock* (1884) 51 L. T. 659.—J. G. P.

defendants had failed to show that he was tenant to them, inasmuch as there was no evidence of the transfer of the property to Ward and Newman. The learned Judge being of such opinion, directed the jury to that effect, and the plaintiff obtained a verdict, with 4*l.* 4*s.* damages.

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Cockburn, in Michaelmas Term last, obtained a rule *nisi* for a new trial, on the ground of misdirection, and contended, that as the plaintiff had paid rent to an authorised *agent of the defendants, he was estopped from denying their title; and he cited *Gouldsworth v. Knights* (1).

[*52]

Butt and *Kingdon* now showed cause :

The direction was correct. It appeared by the evidence adduced on behalf of the defendants, that the title to the property in question was vested in Messrs. Ward and Baynton; and as it was not proved to have passed to Messrs. Ward and Newman, it is to be presumed that the estate remained vested in the first trustees. The defendants therefore failed to show any title in themselves. The receipts given were merely for the trustees of Mr. and Mrs. Clarke, and the plaintiff was neither aware of, nor did he recognise, the change of the trustees.

(ROLFE, B.: There was no evidence that the plaintiff paid the rent for the first set of trustees only. He paid it to Horwood for the trustees, whoever they might happen to be at the time of the payment.

ALDERSON, B.: The transaction amounts to this: the plaintiff pays the agent the rent, implying at the same time that it is of no importance to him who the trustees may be, provided the agent pays the amount over to the party really entitled to it. Receipt of rent is some evidence of title.)

Cockburn and *M. Smith*, in support of the rule, were not heard.

PARKE, B.:

The rule must be made absolute. I think that there was evidence in this case that the plaintiff held the premises upon which the distress was made, as tenant to the defendants, Thompson

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and Howard. It was proved that Mr. Horwood received certain sums of money from the plaintiff as rent for Messrs. Ward and Baynton, and subsequently other sums for rent; and the defendants, in order *to obtain the verdict, were bound to show that they were entitled to this rent, on account of which the distress was made. The terms of the holding are not disputed, and the only question is, whether the defendants made out a sufficient title in this case to receive the rent. It has been urged, on the part of the plaintiff, that Mr. Horwood did not inform the plaintiff upon whose account he received the rent. If, however, Ward and Newman had distrained for rent, the receipt of previous rent by Horwood, as their agent, on their account, would be some evidence of their title, although he did not disclose their names to the plaintiff. Here there is some evidence that Ward and Newman were entitled to the rent, and the question is, whether the fact that the plaintiff had paid rent to Ward and Baynton makes any difference. That only affects the weight of the evidence, for it was competent to the plaintiff to have shown that the payment had been made upon the supposition that it was to go to Ward and Baynton, to whom it had been paid before, since every payment which is made by a tenant under a mistake or in ignorance of the party's title to whom he has paid it, may be shown by him to have been so made. The plaintiff might dispute the fact of the assignment of the reversion as having been made by fraud. Upon the proof of the payment to Ward and Newman, the plaintiff would be at liberty to show that Ward and Baynton were the persons he intended to receive it. But he did not do so; and then there was evidence that Mr. Horwood was the person duly authorised to receive the rent for Ward and Newman. That being so, there was evidence in this case—I do not say more than that—but there was some evidence to support the avowry, although the plaintiff did not know, at the time the payments were made to the receiver, the fact that the title to these premises had passed to the second set of trustees.

ALDERSON, B.:

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I am of the same opinion. The payment *of rent, and the terms under which the plaintiff held, having been proved in this case, the only question is, under which of the two landlords he held. There was a conveyance of the premises to the present defendants by Ward and Newman, and if they had the power to convey, the defendants are the proper parties to receive the rent. The question,

therefore, is, whether payment of rent to an agent who has not disclosed his principal, but who has received the rent on account of the principal, and has paid it over to him, is any evidence that the principal is entitled to it. We have to say whether a payment, under such circumstances, was any evidence to go to the jury, and I think that it was.

HITCHINGS
v.
THOMPSON.

ROLFE, B. :

I am of the same opinion. At first I was inclined to think that the learned Judge was right in his direction, and that one link in the chain of the defendants' evidence was wanting, namely, their title to the property, by having omitted to prove a conveyance to Ward and Newman. But I am now satisfied that the proof of that conveyance was not necessary in the present case. Here the fact of the payment of the rent to the authorised agent, and the receipt of it by Ward and Newman, was *prima facie* evidence of the title of the latter. Then, as the defendants had not received any rent, it became necessary for them to show a conveyance to themselves by persons competent to convey. They did prove a conveyance from Ward and Newman, and there was some evidence that those persons were competent to convey the estate.

PLATT, B. :

In ordinary cases of this description the title of the party is shown by the pernancy of the profits. In this case the rent is to be taken as paid to the persons really entitled to it. If the plaintiff did not know that the person to whom he had paid the money was the agent of Messrs. Ward and Newman, and that he had paid it to *him for other parties, it was open to the plaintiff to have shown that the money was improperly paid. But the question here is, whether there is any evidence from which the jury might infer that the persons who received the profits were at that time the reversioners. I think there is ; for there was a pernancy of the profits. The defendants established a *prima facie* case, and consequently there was evidence to go to the jury of their title to the premises in question. The rule, therefore, must be absolute.

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Rule absolute.

1850.
Jan. 18.
Feb. 25.

CHAPMAN AND ANOTHER v. MILVAIN (1).

(5 Ex. 61—66 ; S. C. 19 L. J. Ex. 228 ; 1 L. M. & P. 209 ; 14 Jur. 251.)

[61]

A Company of persons, established for the purpose of carrying on the business of bankers under the provisions of the 7 Geo. IV. c. 46, in an action against a shareholder for the recovery of a debt, or for enforcing any claim or demand due to the co-partnership, are bound to sue in the name of one of their public officers, and are not at liberty to sue in the names of the covenantees named in the deed of co-partnership. The words of the 9th section of the Act, "shall and may," are obligatory, and not merely permissive.

THIS was a special demurrer to a plea, and was argued in Hilary Term [1850].

Granger, for the plaintiffs, cited *Pentland v. Gibson* (2), *Rex v. James* (3), *Reg. v. Beard* (4), and *Skinner v. Lambert* (5).

Hugh Hill, *contra*, cited *Smith v. Goldsworthy* (6), *Wills v. Sutherland* (7), and *Steward v. Greaves* (8).

The pleadings and the arguments are so fully set forth in the judgment of the Court, that it is not necessary to repeat them.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. :

This is an action by the two plaintiffs, Messrs. Chapman, on a covenant with them by name, contained in the deed of copartnership of the Newcastle, Shields, and Sunderland Union Joint-stock Banking Company, made on the 1st of October, 1830. The different subscribers covenant, each one for himself, to pay calls duly made, and the defendant, being a subscriber, is sued on his covenant, for non-payment.

The defendant craves *oyer* of the deed, which is set out ; and then pleads, that the Banking Company was and still is a Company of persons united in copartnership for *the purpose of carrying on the trade and business of bankers in England, according to the statute 7 Geo. IV. c. 46 ; that there were and are public officers of the copartnership according to that statute, and that the sums

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(1) Cited in *Coe v. Wise* (1866) L. R. 1 Q. B. 711, 721.—J. G. P.

(2) 1 *Alcock & Napier*, 310 [Ireland, K. B. 1831—3 ; only one vol. published].

(3) 7 Car. & P. 553.

(4) 8 Car. & P. 143.

(5) 4 Man. & G. 477.

(6) 4 Q. B. 430.

(7) 4 Ex. 211.

(8) 10 M. & W. 711.

of money sought to be recovered in the action were debts, claims, and demands due to the copartnership, and relating to the concerns of the same.

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To this plea there is a special demurrer ; and the question is, whether the statute 7 Geo. IV. c. 46, s. 9, as to the right of a Joint-stock Company to sue, applies to such a Company as this ; and, if it does, whether that part of the section is permissive or obligatory.

The section is to this effect : That all actions and suits against any person who may be at any time indebted to any such copartnership, carrying on business under the provisions of the Act, and all proceedings at law or in equity to be commenced or instituted for or on behalf of any such copartnership against any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts, or enforcing any claims or demands due to such copartnership, or for any other matter relating to the concerns of such copartnership, shall and lawfully may, from and after the passing of the Act, be commenced or instituted and prosecuted in the name of any one of the public officers, nominated as aforesaid for the time being of such copartnership, as the nominal plaintiff for and on behalf of such copartnership ; and that all actions or suits and proceedings at law or in equity, to be commenced or instituted by any person or persons, bodies politic or corporate or others, whether members of such copartnership or otherwise, against such copartnership, shall and lawfully may be commenced, instituted, or prosecuted against every one or more of the public officers nominated as aforesaid for the time being of such copartnership, as the nominal defendant for or on behalf of such copartnership ; and that all indictments, informations, *and prosecutions by or on behalf of such copartnership for any stealing or embezzlement of any money, goods, effects, bills, notes, securities, or other property, of or belonging to such copartnership, or for any fraud, forgery, crime, or offence committed against or with intent to injure or defraud such copartnership, shall and lawfully may be had, preferred, and carried on in the name of one of the public officers, nominated as aforesaid for the time being of such copartnership ; and that, in all indictments or informations to be had or preferred by or on behalf of such copartnership, against any person or persons whomsoever, notwithstanding such person or persons may happen to be a member or members of such copartnership, it shall be lawful and sufficient

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to state the money, goods, effects, bills, notes, securities, or other property of such copartnership, to be the money, goods, effects, bills, notes, securities, or other property of any one of the public officers nominated as aforesaid for the time being of such copartnership; and that any forgery, fraud, crime, or other offence committed against, or with intent to injure or defraud any such copartnership, shall and lawfully may, in such indictment or indictments, be laid or stated to have been committed against or with intent to injure or defraud any one of the public officers nominated as aforesaid for the time being of such copartnership; and any offender or offenders may thereupon be lawfully convicted for any such forgery, fraud, crime, or offence; and that, in all other allegations, indictments, informations, or other proceedings of any kind whatsoever, in which it otherwise might or would have been necessary to state the names of the persons composing such copartnership, it shall and may be lawful and sufficient to state the name of any one of the public officers nominated as aforesaid for the time being of such copartnership; and the death, resignation, or removal, or any act of such public officer, shall not abate or prejudice any such action, suit, indictment, prosecution, *information, or other proceedings commenced against or by or on behalf of such copartnership; but the same may be continued, prosecuted, and carried on in the name of any other of the public officers of such copartnership for the time being.

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That the Company may sue on a covenant such as this was hardly disputed; indeed, it was not disputed on the argument before us. That question must be considered as settled by the case of *Wills v. Sutherland*, and the prior cases there referred to. The only question argued was, whether they must sue. The case of *Steward v. Greaves* decided, that the part of the section which relates to actions against the Company was obligatory on all who had causes of action against them. The words "shall and lawfully may," are in their ordinary import obligatory, and ought, as was said in that case, according to the established rules, to have that construction, unless it would lead to some absurd or inconvenient consequence, or be at variance with the intent of the Legislature, to be collected from other parts of the Act. The ordinary construction was in that case manifestly in accordance with the intention of the framers of the Act. It would have entirely altered the nature of the obligation of the partners of a joint-stock Bank, to hold that they could be sued as individuals.

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There is not the same forcible reason for construing these words in their ordinary sense, where the Company are plaintiffs; but there is no reason why we should not. Indeed, it would be inconvenient to the covenantors to have their position altered according to the option of the Company. If the Company chose to sue the covenantors in the name of the covenantee, the covenantee only would be liable to pay costs in the case of a nonsuit or verdict against him, and the defendant would have a set-off only of debts due from the covenantee; or if the Company chose to sue in the name of the officer, the Company would *be liable to costs, and the defendant have a set-off of the Company's debt only. This inconvenience affords an additional ground for holding that the words are to bear their ordinary sense, and be held to be obligatory.

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It will be said, then, that the Company, if this construction is to prevail, could not take a security to a trustee, who alone could have the legal title to sue—a right which every individual person has—and that it could not have been the intention of the Legislature to deprive Companies of that privilege. We are not prepared to say that the Company might not so word the security to their trustee as to avoid that inconvenience, if it be one, and vest the sole right of action in the trustee; but on a covenant worded as this is, we do not think that object, if it existed, was accomplished. We see no reason, therefore, for construing these words, which are *prima facie* obligatory, in any other than their usual sense. If, indeed, this question had been concluded by judicial decision, we should be bound by it; but the cases cited do not appear to be sufficient for that purpose. *Rex v. James* (1) reports the inclination only of the opinion of my brother PATTERSON, that the statute 7 Geo. IV. might not be imperative as to laying the intent to defraud the public officer; and in the subsequent case of *Rex v. Beard* (2), where Mr. Justice COLERIDGE intimated a similar opinion, the point was just mentioned, not argued. We are aware of the decision of the Court of Queen's Bench in Ireland, *Pentland v. Green* (3), in which that Court held that the private statute, 5 Geo. IV. c. clx., was only permissive, and that the Company to which it applied had the option of suing in the name of the covenantee. But the language of that statute, as appears by the report, was different from the present statute, the 7 Geo. IV. c. 46, and seems to have been, *according to its ordinary construction, permissive only. Upon

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(1) 7 Car. & P. 553.

(3) Alcock & Napier, 310.

(2) 8 Car. & P. 145.

CHAPMAN the whole, we think the words "shall and lawfully may" are
MILVAIN. obligatory, and ought so to be construed in this case; and therefore
our judgment should be for the defendant.

Judgment for the defendant.

1850.
Feb. 7.

[66]

GLOVER v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

(5 Ex. 66—69; S. C. 19 L. J. Ex. 172.)

B., having contracted with a Railway Company to set up the fencing of their line, employed G. to supply posts and rails for a part of the line. B. became bankrupt, and a quantity of the unfixed fencing was removed by G.'s direction to an adjacent field, and sold to the plaintiff. This fencing was afterwards carried back to the railway by labourers acting under the direction of an overlooker of the Company. G. asked the men upon what authority they removed the fencing, and was told to apply to the engineer of the Company. G. afterwards saw one of the directors of the Company, who told him to attend a meeting of the Company. G. went to the office of the Company for that purpose, and was told by the same director, that there was a prospect of an amicable arrangement with B., and that all claims on the line would be paid. A demand was afterwards made upon the secretary of the Company, who stated that he was not the party on whom the demand ought to be made: Held, in trover against the Company, that there was no evidence of a conversion by them.

TROVER for certain posts and rails. Plea, Not guilty.

At the trial, before Coleridge, J., at the Leicester Summer Assizes, 1849, it appeared that, the defendants being empowered to construct a branch line of railway, called "The Stamford and Rugby Railway," one Burton contracted with them to set up and complete the fencing of the line, and that one Gimpson contracted with Burton to supply the posts and rails for fencing a portion of the line. Some of these posts and rails were set up; but Burton having become bankrupt, disputes arose between him and the Company, and a quantity of the unfixed fencing was removed by Gimpson's direction to an adjacent place, called Foxes Field, and sold by him to the plaintiff. This unfixed fencing was afterwards carried away from Foxes Field to the railway, by labourers acting under the direction of one Grover, an overlooker of the Company. A person in the employ of Gimpson asked the men upon what authority they removed the fencing, and was told to apply to Wilson, the engineer of the Company, who, on being applied to, "dared him to remove the fencing," and said "he would enter an action if he did." Gimpson afterwards saw one Ellis, a director and chairman of the committee of works, who recommended him

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to attend a meeting of the Company in London. Gimpson went to the offices of the Company for that purpose, and there saw Ellis, who then told him that there was a prospect of an amicable arrangement with Burton, and that all claims on the line would be paid. A demand of the posts and rails was afterwards made upon one Watkins, the secretary of the Company, who stated that he was not the party on whom the demand ought to be made. Under these circumstances it was objected, on behalf of the defendants, that there was no evidence of a conversion by them. The learned Judge declined to nonsuit, and a verdict was found for the plaintiff, leave being reserved for the defendants to move to enter a nonsuit.

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A rule *nisi* having been obtained accordingly,

Mellor showed cause :

First, there was evidence of a conversion by the removal of the posts and rails from Foxes Field to the railway. The act was done by persons employed in the construction of the railway, who must therefore be presumed to be the servants of the Company, and who were acting within the scope of their authority, and for the benefit of the Company. The case, therefore, falls within the principle of the decisions of *Smith v. The Birmingham Gas Company* (1), and *Maud v. The Monmouthshire Canal Company* (2). The statement of Ellis, one of the directors, is evidence against the Company of their liability, in the same way that the admissions of a parishioner will affect the parish, though he cannot bind them by his contract.

(PARKE, B. : Admissions made by the directors at a board meeting will bind the Company, but not what a single director says when not at a board meeting.)

This case is not within the difficulty which arose in *Quarman v. Burnett* (3), and *Laugher v. Pointer* (4), for the *engineer and over-looker were clearly the servants of the Company. It also differs from *Rapson v. Cubitt* (5), for there the injury was caused by the negligence of a sub-contractor.

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(PARKE, B. : Assuming that the wrongful act was done by the servants of the Company, there is no evidence that the Company ordered or assented to the act of their workmen.)

(1) 40 R. R. 358 (1 Ad. & El. 526).

(4) 29 R. R. 319 (5 B. & C. 547).

(2) 4 Man. & G. 452.

(5) 60 R. R. 873 (9 M. & W. 710).

(3) 55 R. R. 717 (6 M. & W. 499).

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Secondly, the demand on the secretary, and his conduct, was evidence from which the jury might find a conversion. By the 135th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, "Any summons or notice, or any writ or other proceeding at law or in equity requiring to be served upon the Company," &c., may be served by "being given personally to the secretary." This demand is in the nature of a notice to the Company.

(PARKE, B.: It is not a notice within the meaning of that section.)

Whitehurst (Macaulay with him), in support of the rule :

Burton was the contractor for fencing the line, and it is to be presumed that the acts were authorised by him, rather than by the Company. The plaintiff has failed to show either that the defendants authorised any one to commit the tort, or that they adopted it. (He was then stopped by the COURT.)

PARKE, B.:

I think there was no evidence to fix the Company. In the first place, it is clear that the Company did not do the act complained of by their servants, but through the medium of Burton the contractor, and the inference therefore is, that the act was that of the contractor, and not of the Company. If then the act was not that of the Company, they cannot be liable unless they have adopted it. In order to fix the Company, it must be shown that the act was done by their authority, that is, by some person acting for them, within the scope of his authority, *or by appointment under seal, or by the Company acting together in committee. That is not the case here, and there is no evidence of a subsequent adoption of the act of the contractor.

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ALDERSON, B.:

I do not see any evidence of a conversion by the Company. The act was originally done by the contractor, and if the Company had adopted it, that would have been evidence of a conversion by them. But that is not the case here.

ROLFE, B., concurred.

Rule absolute.

CARR *v.* MOSTYN.

(5 Ex. 69—90; S. C. 19 L. J. Ex. 249.)

Under the Church Building Act, 1831 (1 & 2 Will. IV. c. 38), s. 14, by which the fees, dues, offerings, or emoluments of right or custom belonging to the incumbent of the parish, chapelry, or place in which the newly erected church is situate, are to be received on account of such incumbent, except such part as the Commissioners, with the consent of the Bishop, the patron, and the incumbent in some cases, and the Bishop alone, with the consent of the patron and incumbent, in others, shall assign to the minister of the district church,—the term “chapelry” means a legal parochial chapelry, and therefore one which is immemorial.

Upon a trial, where the question was, whether the chapelry of St. H. was a legal parochial chapelry: Held, that the statement of a witness, that he had heard from a former incumbent of St. H. that the people of four townships and another parish came to the chapelry, was admissible in evidence, inasmuch as the rights of the chapel in question were sufficiently of a public nature to make reputation admissible.

So, a case stated by a deceased incumbent of St. H. for the opinion of a proctor, with his opinion thereon, was held admissible, on the same principle as the statement of a deceased occupier, which qualifies his estate, is admissible.

Held, also, that the answer of the incumbent of St. H., and other clergymen, to questions sent by the Bishop of C., the diocesan, for the information of the Governors of Queen Anne's Bounty, at the time an augmentation was made, was admissible, as being in the nature of an inquisition on a public matter.

ASSUMPSIT for money had and received, and on an account stated. Plea, *Non assumpsit*.

At the trial, before Wightman, J., at the Summer Assizes at Liverpool, 1847, a verdict was found for the plaintiff for 6*l.* 1*s.* 6*d.*, subject to the opinion of this Court, on a case which in substance embodied the following facts:

The action is brought to recover the amount of certain surplice fees received by the defendant. The plaintiff is *the incumbent of the Chapel of St. Helen's, in the county of Lancaster. The defendant is the incumbent of the Chapel of St. Thomas, in the same county.

The Chapel of St. Helen's, as well as that of St. Thomas, is situate within the parish of Prescott, which comprises fifteen townships, the whole of which contribute to the repairs and maintenance of the parish church, which is situate in the parish and township of Prescott. The living is a vicarage in the gift of King's College, Cambridge. The Chapel of St. Helen's, now called St. Mary's St. Helen's, but which was formerly known as St. Ellen's, or St. Helen's, is an old building long used as a chapel for the performance of Divine worship, in the township of Windle, in the parish of Prescott. The feoffees, acting under a deed of trust hereinafter

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mentioned, have the nomination of the minister or incumbent. The Chapel of St. Thomas was erected by Peter Greenall, Esq., under the provisions of the Acts 1 & 2 Will. IV. c. 38, and 1 & 2 Vict. c. 107, and was consecrated on the 8th of October, 1839.

The plaintiff at the trial called two previous incumbents of St. Helen's, and one of the trustees and patrons of the chapel, who stated in effect, that St. Helen's is within the parish of Prescott, but three or four miles from the parish church of Prescott; that St. Helen's Church was an old one when the first incumbent went there, and that there was a house for the incumbent, and glebe; that he was nominated by the trustees, and that the vicar had nothing to do with it; that full service, morning and evening, was performed there; that there was a font, and baptism, marriages, burials, churchings of women, and confirmations, were performed there, and all the services of a parish church. That the people came to that church for baptism, &c., from the townships of Sutton, Eccleston, Parr Windle, and part of Haydock; (but one of the witnesses stated, that they came from parts of Sutton and Eccleston respectively, instead of from the whole of those *townships). All the townships, except Haydock, were in Prescott parish. Haydock was in the parish of Winwick. Marriages and burials of persons from other parts of the parish of Prescott were sometimes performed at St. Helen's. That the vicar of Prescott never interfered with the performance of the rites of the church within what the witnesses called the parochial chapelry; and that the successive incumbents of the chapelry visited the sick within the same; that one of them, a Mr. Finch, at first refused to do so, but was compelled to perform that duty by the trustees. That they received all the surplice fees for burials, marriages, and churchings, and the whole emoluments for Divine service within that district as incumbents, and never accounted to any one for them. That the population varied from 18,000 to 20,000. That there were parish registers. That the inhabitants of the district assigned to St. Thomas used to attend St. Helen's Chapel, and the district assigned to St. Thomas was within that belonging to St. Helen's, being in the township of Eccleston. That, for some time after the consecration of St. Thomas, the incumbents of that chapel paid surplice fees received by them to the incumbent of St. Helen's. That the incumbent's house at St. Helen's was under trustees, successors of the original feoffees, who had lately parted with it and had provided another residence; and the trustees had

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also dealt in the same manner with the glebe. That the income of the incumbent of St. Helen's arises from surplice fees, and from tithes of hay, and from an estate, which, together with that from whence the tithes issued, were not in the so called chapelry, or in the parish of Prescott at all. That there was no chapel rate levied there. That the chapel had chapel-wardens,—one appointed by the incumbent, and the other by the trustees,—but that it had not any wardens previous to the consecration in 1816. That the trustees repaired the church at the expense of private individuals. That the pews in St. Helen's were held by persons residing *in the district, with one exception, or having property there.

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Mr. Fildes, one of the trustees of St. Helen's, aged 67 years, and who had always attended St. Helen's Chapel, stated that the district of St. Helen's had been well known all his time. It also appeared by the evidence of one of the incumbents of St. Helen's, that the sacramental bread and wine for the Chapel of St. Helen's were furnished out of the general church-rate of the parish of Prescott, and that all the townships contributed to the general church-rate of the parish of Prescott. It was also stated by one of the previous incumbents, that one ground for saying that the people of the four townships and Haydock came to St. Helen's was, that his predecessor, Mr. Pigott, who was dead, told him so; but, that answer being objected to by the defendant, was only to be evidence if the Court thought it admissible.

The receipt of fees by the defendant was proved.

The deeds of consecration and assignment of district to St. Thomas, dated the 8th of October, 1839, were proved. These deeds made no mention of any chapel or chapelry of St. Helen's, and treated the chapel and district assigned to St. Thomas as being situate in the parish of Prescott, independent of any supposed chapelry of St. Helen's. In the schedule to the consecration deed were the following clauses:

“Baptisms, marriages when, and as the same shall be authorised by law, churchings, or burials, shall be solemnised and performed in this church, subject to all Acts of Parliament, laws and customs, relating to the performance of such offices. But, in order that the erection of this church may not prejudice the incumbent of the parish church of Prescott, nor lessen the revenues thereof, there shall be paid to the minister, and also to the clerk and sexton of this church for the time being, for the performance of the several and respective duties which may at any *time hereafter be performed

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therein, double the fees which are usually or of right ought to be paid for the performance of any such duties in the said parish church; and the said minister, clerk, and sexton of this church for the time being, shall collect and receive such double fees, and account for and pay one moiety or equal half part thereof to the minister, clerk, and sexton of the said parish church respectively, by two equal half-yearly payments in each year, to wit, on the 1st of January and the 1st of July, and that the remaining moiety or half part thereof shall be divided amongst the minister, clerk, and sexton of this church for the time being, in such shares and proportions as fees of the like nature and for the like services are usually or of right ought to be paid and divided among the minister, clerk, and sexton of the said parish church."

The schedule also contained a clause, that the incumbent and churchwardens should keep a register of all christenings and burials, and transmit the same to the vicar or other proper officer of the parish of Prescott.

The incumbent of St. Helen's in 1839 stated, that he protested against the first of these clauses, and, in consequence thereof, the incumbents of St. Thomas paid surplice fees to him, and not to the vicar of Prescott, for some years.

A faculty, dated the 3rd of May, 1816, for pulling down part of St. Helen's Chapel, previous to the enlargement, and a consecration deed of additional burial ground adjoining the chapel, dated the 3rd of July, 1816, and a consecration deed of St. Helen's Chapel, dated 2nd of October, 1816, were also given in evidence. In each of these documents the chapel was referred to as a parochial chapel, and the district was styled a chapelry, and the inhabitants referred to as residing in the chapelry; but no reference was made to any previous act of consecration, nor was any defined district mentioned as appertaining to the *chapel. Provisions were contained in the consecration deed of the chapel for the appointment of chapelwardens, and raising funds for the expenses of the chapel by means of rates on the pews, but no reference was made to any other description of chapel rate. Registers of incumbents of St. Helen's were produced from the diocesan registry. The first was dated October 5, 1758, and nominated a clerk "to read and perform Divine service according to the usage of the Church of England as by law established, in the Chapel of Hardshaw within Windle, in the city of Lancaster, called St. Ellen's Chapel, now vacant by the death of P. B., clerk, &c." The next, dated December 26, 1785,

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was in similar terms, with the addition of a request from the trustees to the Bishop "to grant the clerk licence to serve the said cure, and to perform all Divine offices therein accordingly." The third, dated September 21, 1815, was in terms similar in effect. The next, dated December 12, 1836, stated that the parties named therein, "being the major part of the trustees, and patron of the chapel formerly called St. Helen's Chapel, but since consecrated by the name of St. Mary's in Hardshaw within Windle, otherwise St. Helen's, within the parish of Prescott, in the county of Lancaster and diocese of Chester," in exercise of the power and authority contained in indentures of lease and release, dated respectively October 21 and 22, 1825, for the appointing new trustees of the chapel, and of all other powers, &c., did nominate a clerk to be curate, minister, or chaplain of the said Church or Chapel of St. Mary within Hardshaw in Windle, otherwise St. Helen's aforesaid; and another nomination, dated October 11, 1841, nominated unto the Bishop, and to the perpetual curacy of St. Mary's Church, St. Helen's, a clerk, praying the Bishop would be graciously pleased to grant him his licence for serving the said cure, and invest him with all and singular the rights, *members, and appurtenances thereunto belonging. The last, dated the 24th of September, 1846, being the nomination of the plaintiff, was in similar terms.

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The defendant gave in evidence the deed of feoffment (which was in Latin) of the chapel, dated the 23rd of January, 11 James I., of Katherine Dowmbell and James Dowmbell her son, giving, granting, and confirming to certain trustees, "all those the messuage, chapel, and building in Hardshaighe within Windle, called the Chapel of St. Helen's, with all and singular their appurtenances; and also all that piece of land lying around the chapel, called the Chapel Yard, and upon which the messuage, chapel, or buildings aforesaid stand, or have been built, together with a certain *incrothiamento* (1) or small piece of land within a certain inclosure in the same place, called the Chapel Croft, containing" &c.; *habendum* to them and their heirs and assigns for ever, subject to the trusts in the schedule mentioned, to hold from the capital lords of the fee for the services thence owing and of right accustomed; and also to pay annually to the said Katherine and James Dowmbell, their heirs and assigns, one penny. There was the appointment of attornies for livery of seisin, and an indorsement that seisin was accordingly delivered.

(1) [Read *incrochiamento*, encroachment. Spelman, Gloss. s.v. *incrocare*.—F.P.]

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The schedule (which was in English) was as follows :

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“ Know all men by these presents, that we, Katherine Dowmbell and James Dowmbell, named in the said deed of feoffment whereunto this schedule is annexed, as well to the intent that Divine service may be continued in the chapell mentioned in the said deed, and to the intent that the same, now being in great decaie, might be repaired for the ease of our loving neighbours of Hardshaighe, Windle, Parre, Sutton, Haidocke, and Eccleston, and of their posterity, as also for divers other good causes and considerations us moving, have made the said deed to the uses and intents hereafter in this schedule expressed and declared. Wherefore, we the said Katherine and James Dowmbell *do now by these presents openly publish, set forth, and declare that the very true intent and meaning of the making of the said deed of feoffment and the execution thereupon to be had and made, is and shall be, that the trustees (naming them) in the said deed of feoffment, and the survivors or survivor of them, and his heirs, shall, presently after the execution of the same deed, stand and be seised of and in the messuage, chappell and buildings mentioned in the said deed, with appurtenances, &c., to the only use and behoofe of the said trustees, and of their heirs and assigns for ever, upon trust, that the said co-feoffees named in the said deed of feoffment, their heirs and assigns, and the survivor of them or some of them, shall from time to time, and at all times hereafter, repaire and upholde the said messuage, chappell and premises, and shall also, so often as the same shall become void or be without any incumbent or fit person to read Divine service faithfully and truly, elect and choose lawful and fit persons to read Divine service at the said chappell for ever ; and set down and determine orders, directions, and rules for the government and ordering of the said chappell, chaplen, and incumbent from time to time, and shall and may appoint seats and forms in the said chappell unto the inhabitants of the said townships, as to the said feoffees, their heirs and assigns, or the greater number of them, shall be thought meet and convenient ; respecting always, that persons may be preferred in their seats according as they shall extend their bounties and furtherance in maintenance of the said chappell and incumbent there : Provided always, and it is the mind and full intent of us the said Katherine and James Dowmbell, and of the making thereof, that when any of our said feoffees shall die or depart out of the towns aforementioned to dwell elsewhere, or to be disabled in person for any cause, that then and in such case or

cases, within one month after such death, departure, or disability, it shall be lawful for the residue of the said feoffees then living (not *disabled), to elect other person or persons of anie the towns aforesaid to supply the rooms of such defect, for the government, order, direction, and seating of the said chappell and chaplen ; also, that the survivors of our said feoffees, and the two last and longest living of them, shall make feoffment or feoffments of the premises unto such other person or persons so elected or to be elected, within the townes aforesaid, or within some of them, to the number of nine at the least, to be governors and feoffees aforesaid, and to their heirs and assigns for ever, to the use and intent aforesaid ; and that such elections of persons and making of feoffments, when and as often as occasion shall require, be used and continued for ever according to the mind of us expressed in these presents, and not otherwise."

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The Chapel of St. Helen's had been augmented by the Governors of Queen Anne's Bounty, the first time in 1716, the second time in 1725, and the third in 1825. On the occasion of the last of these augmentations, certain queries were addressed by the Bishop of Chester to the then perpetual curate of St. Helen's, the vicar of Prescott, and another clergyman. Copies of these queries, and of the whole of the answers thereto, were to form part of the case, if this Court should be of opinion that they were properly receivable in evidence as against the present defendant. Amongst the queries were the following: "Is it united to or consolidated with any other, and what church? Is it a parish of itself? If a chapel of ease, is the incumbent of the mother church obliged to do the duty himself or provide a curate to do it for him? And what distance is the chapel from the mother church? What is the number of inhabitants within the parish or chapelry?" Answer: "It is a parochial chapelry within the parish of Prescott. It is not united to or consolidated with any other church. The number of inhabitants within the district under the immediate care of the minister of St. Helen's is at least 9,000. Prescott is four miles from St. Helen's." In another answer *it was stated, that the full services of the church were performed at St. Helen's, and that half of the incumbent's time was taken up in visiting the sick ; that the surplice fees were very little more than 20*l.* per annum, as very few marriages were solemnised at St. Helen's. These answers were signed by the vicar of Prescott and the perpetual curate of St. Helen's, and a clergyman of an adjoining parish.

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The defendant also gave in evidence a case submitted for the opinion of a proctor, in 1809, by Mr. Finch, the then incumbent of St. Helen's, with the opinion of a proctor thereon, which said case and opinion were on the 26th of September, 1815, sent to the then vicar of Prescott, in and with a letter by a then acting trustee of St. Helen's. These documents were objected to by the counsel for the plaintiff, and were respectively to be used or not, as the Court should think them admissible or not. The case in effect stated the preceding deed of feoffment of 11 James I. the augmentations by Queen Anne's Bounty, and purchase of lands therewith, and the chapel was stated to have gone by the name of a donative. That it knew no acknowledgment to Prescott Church, though that parish extended close to the chapel-yard walls; that the inhabitants of the said townships of Windle, Sutton, Parr, Eccleston, and Haydock, who could purchase or rent seats in St. Helen's Chapel, resorted to it to worship, might be married in it, (though many of them went to other churches for those purposes,) might have their children christened in it, and bury their dead in the churchyard if they had any breadth of ground in it, or else they went to other churchyards for that purpose. It was also stated, that endowment lands of St. Helen's paid tithes to the rector and vicar of the parish, and the inhabitants, including the minister of St. Helen's, were liable to the church rates of the parish. The opinion was, that the chapel, originally a donative, became a perpetual curacy on augmentation of Queen Anne's Bounty, under the 1 Geo. I. c. 10, s. 62, but its character was not otherwise affected thereby; that its duties were local and confined within the walls of the chapel; and that the duty of visiting the sick continued in the ministers of Prescott and Winwick.

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The register books of the parish church of Prescott, relating to baptisms, marriages, and burials within the parish of Prescott, were put in evidence. The books commenced, as to baptisms, in the year 1580; as to marriages, in the year 1573; and as to burials, in the year 1573; and, with some occasional exceptions, continued regularly down to the present period. Up to the year 1677 the books showed the performance of ceremonies for parties from every part of the parish, and during that period the larger number of marriages recorded were of parties residing in that part of the parish which is comprised in the district now claimed as attached to St. Helen's. From the commencement of those registers to the present time great numbers of persons have been baptized,

married, and buried at the parish church from the district now claimed as belonging to St. Helen's. During the last seventy years, however, with respect to baptisms and burials from the two townships of Windle and Parr, the number of those ceremonies at the parish church has been inconsiderable as compared with the number of those from the same two townships at St. Helen's Church.

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Various extracts from the register books of the parish were annexed to the case; and from them it appeared, that, in 1677, and nine following years, and occasionally for some subsequent years, returns were forwarded from St. Helen's to the parish church of all baptisms had at St. Helen's, and such returns were entered in the parish books with a heading thus: "Christenings by Mr. Greg, Preacher at St. Helen's Chapel, Noncon'ormist." And other similar entries were made in the parish register of returns from other Nonconformist ministers officiating within the parish *of Prescott, at other chapels within the parish. There were also several similar returns of burials made at St. Helen's, by preachers stated to be Nonconformists; and in the parish register book of burials for the year 1678, appeared an entry of persons buried "in other burial places belonging to the parish of Prescott, and not then put in, wrapped, or wound up in any shift, shirt, sheet, or shroud made or mingled with flax, hemp, silk, hair, gold or silver, or other than what is made of sheep's woole only, or in any coffin lined or faced with any cloth, stuff, or any other thing made or mingled with flax," &c., according to the 30 Car. II. stat. 1, c. 3; and burials there appeared as made at St. Helen's by a Nonconformist preacher. The register books of the Chapel of St. Helen's were also put in evidence. The entries of baptisms began on the 18th of October, 1713, of burials on the 8th of April, 1721, and marriages in May, 1722; and it appeared from the register of St. Helen's, that, from the year 1813 up to the present time, the registers had been kept in accordance with the Act 52 Geo. III. c. 146, except so far as altered by the more recent Marriage Act. During the whole of this time the baptisms and burials there solemnised appeared to have been almost exclusively from the four townships of Windle, Parr, Sutton, and Eccleston, and the township of Haydock; and during the last seventy years, the number of baptisms and burials solemnised at the Chapel of St. Helen's from the four townships in the parish of Prescott, claimed by St. Helen's, were in a very

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much greater proportion as compared with the number from the same townships solemnised at the parish church of Prescott; but from the township of Eccleston the parish church had always had the larger number. With respect to the marriage register at St. Helen's from 1720 to 1833, no mention was made, save in a few cases, of the townships whence the respective parties came; but from the latter time to December, 1846, by far the greater number (considerably more than two-thirds of the whole) of parties residing *in the district now claimed by St. Helen's have been married at the parish church.

The question for the opinion of the Court was, whether, under the preceding state of facts, the plaintiff was entitled to recover. If the opinion of the Court should be in the affirmative, the verdict was to stand; but if in the negative, a nonsuit was to be entered. The Court were to be at liberty to draw any inference from the facts or evidence, and to act as they should think a jury ought to have done.

The case was argued in Hilary Term last (Jan. 16, 21, and 25), by

Cowling, for the plaintiff:

The plaintiff, as incumbent of St. Helen's, is entitled to the fees which he seeks to recover in this action. By the 14th section of 1 & 2 Will. IV. c. 38, it is provided, that "all fees, dues, offerings, and other emoluments, which of right or custom belong to the incumbent or clerk of any parish, chapelry, or other place in which such church or chapel shall have been or shall be erected, shall be received by, or for and on account of such incumbent and clerk respectively, and be paid over to them," &c. And then the clause contains an exception, which has no application to the present question. It is clear that the apportionment of the fees by the Bishop in 1839, as contained in the deed of consecration, cannot affect the decision of the Court, inasmuch as that appropriation is void. It was, no doubt, the intention of the Bishop that the deed should be so drawn as to give the fees to the proper person, and that this matter was inserted by mistake. The district of St. Helen's is a chapelry within the meaning of the preceding section. It is not necessary to contend that this chapelry must be a legal parochial chapelry in the strictest meaning of those terms, for the language of the 14th section is very general. It appears by the facts of the case, that the district of St. Helen's has been treated for upwards

of a century as *altogether a distinct and separate district. But, assuming it to be necessary for the plaintiff to show that this district of St. Helen's is a strictly legal parochial chapelry, it is submitted that the admitted facts lead to that conclusion. The queries addressed to the curate of St. Helen's, and the answers thereto, are admissible, as touching a matter of a public nature. By the statute 2 & 3 Anne, c. 11, first fruits and tenths, to be appropriated to the augmentation of small livings, were settled upon a corporation established by that Act; and, in pursuance of the Act, the Queen by letters patent appointed certain Governors; and by the 1 Geo. I. stat. 2, c. 10, the Courts and committees of the said Governors had power given them to administer an oath to such persons as should give them information or be examined concerning anything relating to the execution of their trust. These queries and answers are evidence as taken in pursuance of the Act. The district of St. Helen's is a parochial chapelry, as falling within the rule given in the 2nd Inst. 868, where it is said, "When the question was, whether it were *ecclesia aut capella pertinens ad matricem ecclesiam*, the issue was, whether it had *baptisterium et sepulturam*; for if it had the administration of sacraments and sepulture, it was in law adjudged a church." In this chapel, in addition to these rites, was marriage performed also, which affords a strong presumption of its being a parochial chapelry, for a priest marrying out of the parish church or a parochial chapel was liable to be suspended: 1 Gibs. Cod. 429, 2nd edit. The language of the Marriage Acts, 26 Geo. II. c. 33, s. 1, and the 4 Geo. IV. c. 76, s. 3, shows that the ceremony of marriage was to be performed in chapels having parochial rights. It is said, in Degge's P. C. 277, in speaking of chapels of ease, that "some of them have parochial rights to christen and bury, and are therefore called parochial chapels, by way of distinction from others that have no such privilege; and these differ in nothing from churches, but in want of rectories and endowments, the mother being to be served before *the daughter." And he adds, "Those chapels of ease which are not parochial cannot bury or christen, but are only used for the ease of the parishioners, to hear the Word of God read and preached, and to join in prayers." It will be contended by the defendant, that the chapel having passed by the deed of feoffment, in the time of James the First, to certain trustees, shows that at that time it was a mere chapel of ease at the most; but it is rather evidence of its having existed at that time as a chapelry. The

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right to bury at the parish church is not inconsistent with the plaintiff's argument. In Gibs. Cod. 221, s. 7, it is said, "The inhabitants of a precinct where it is a chapel (though it is a parochial chapel, and though they do repair it), are of common right contributory to the repairs of the mother church. And if they have seats at the mother church, to go thither when they please, or receive sacraments or sacramentals, or marry, christen, or bury at it, there can be no pretence for a discharge," &c. *Wise v. Creech* (1) is to the same effect. There were no chapel-wardens, nor chapel rates; but it does not appear that any rates were required, and that may be owing to the circumstance, that the trustees would undertake the repairs of the chapel. By the Rubric, the sacramental bread and wine are to be found at the charge of the parish. With respect to the remaining portions of evidence, the admission of which is to depend upon the opinion of the Court, the plaintiff does not object to their admission; but not much weight can be attached to them, as Mr. Finch did eventually visit the sick, although it was contrary to the opinion which was given by the proctor.

Crompton, contra :

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The plaintiff is not entitled to these fees. This district of St. Helen's never was a parochial chapelry. The history of the chapel may be considered *with reference to three periods: First, the 11th of James I.; secondly, the time of the augmentation by Queen Anne's Bounty, in 1716; and thirdly, the consecration, which took place in the year 1816. It is impossible for this district to have been a parochial chapelry at the time the property was passed by the deed. Certain trustees, who were lay persons, were enfeoffed, and livery of seisin was made to them. The chapel could not have been consecrated at that time. There is no trace whatever of this chapel having possessed any ecclesiastical jurisdiction until the time of Queen Anne. The trusts created by the deed are quite inconsistent with the chapelry having been independent. All matters with reference to the chapel, and possessing anything of an ecclesiastical nature, were to be done by the trustees. The repairs of the chapel are provided for by the deed: the appointment of a fit person to read Divine service, and the rules and regulations for the proper government of the chaplain, and for the appointment of pews, are all evidence of its having been at that time a

(1) 2 Lev. 186.

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mere chapel of ease. There is no provision in the deed which would preclude the appointment of a Nonconformist. The chapel had no ancient registers. The right of burial was not an absolute one. The fact that marriages were solemnised there has no weight. The case of *Rex v. Northfield* (1) shows that marriages were formerly celebrated in many chapels which were not parochial. The registers show that more christenings, marriages, and burials were performed at Prescot, of persons from the district of St. Helen's, than there were from St. Helen's itself. It also appears by the registers of the parish, that three of the preachers at St. Helen's Chapel were Nonconformists, and that this was after the Act of Uniformity. The appointments of the several incumbents were not under seal, both of which circumstances are strong evidence that this chapel *was not a benefice at that period. The fact that the minister of the chapel had recourse to the registers of the mother church is another strong presumption in the defendant's favour. The register of births was kept there under the provisions of the stats. 6 & 7 Will. III. c. 6, s. 52, and 7 & 8 Will. III. c. 35. There is no evidence whatever, previous to the stat. 1 Geo. I. c. 10, of its having been a parochial chapelry, and the 2nd section of that Act refers to officiating ministers according to the rites of the Church of England, as to parsons, vicars, and curates; and therefore, the augmentation by Queen Anne's Bounty does not carry the case further. The consecration in 1816 is against the presumption of the chapel having been previously consecrated. It is said in Burn's Eccl. Law (2), that "a church once consecrated may not be consecrated again. To which general rule of the canon law one exception was, unless they be polluted by the shedding of blood; and in that case the canon supposes a reconsecration, though the common method in England was a reconciliation only, as appeareth by many instances in our ecclesiastical records." There were no chapel-wardens until the consecration in 1816; the ancient usage, therefore, contradicts modern reputation. The passage quoted from the 2nd Inst. 363 is denied to be law by Sir G. LEE, in *Line v. Harris* (3). (He also cited the following authorities, to show what had been considered necessary to constitute a parochial chapelry: *Dixon v. Kershaw* (4), *Attorney-General v. Brereton* (5), *Craven v. Sanderson* (6), *Jones v. Ellis* (7),

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(1) 2 Doug. 659.

(2) Vol. 1, p. 336, 9th ed.

(3) 1 Sir G. Lee, 155.

(4) Amb. 528.

(5) 2 Ves. Sen. 425.

(6) 53 R. R. 222 (7 Ad. & El. 880).

(7) 31 R. R. 589 (2 Y. & J. 265).

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Doe d. Brammhall v. Collinge (1), *Reg. v. Clayton* (2), *Moysey v. Hillcoat* (3), *Ball v. Cross* (4), and *Farnworth v. The Bishop of Chester* (5.).

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Cowling, in reply :

This chapelry is a parochial one within the meaning of the 1 & 2 Will. IV. c. 38, s. 14, if it has always been considered as one *de facto*. The several parochial rites which were there celebrated are sufficient evidence of its having always been a parochial chapelry. Thus, the right of burial is such evidence: Com. Dig. "Cemetery" (B.), Burial. So, the fact of marriage being celebrated there is evidence of its being a district: Canons, A.D. 1604, Can. 62; see also Watson's Clergyman's Law, p. 318. With respect to the deed, it may be that some of its provisions were void. The fact that a Nonconformist was an incumbent of the chapel is not of much weight. It is therefore submitted, that, under all the circumstances set forth, the plaintiff is entitled to retain the verdict.

Cur. adv. vult.

The judgment of the COURT was now delivered by

PARKE, B. :

The principal question in this case is one of fact, on which we have, very reluctantly, to perform the duty of a jury.

There are three preliminary questions as to the admissibility of evidence, which are easily disposed of.

The action is brought by the incumbent of the chapel of St. Helen's, to recover from the defendant, the incumbent of the district church of St. Thomas, erected within the alleged limits of the chapelry, under the provisions of the 1 & 2 Will. IV. c. 38, a moiety of the fees, dues, and offerings, received by the defendant. By the 14th section of that statute, the fees, dues, offerings, and emoluments, of right or custom belonging to the incumbent of the parish, chapelry, or place in which the newly erected church is situate, are to be received on account of such incumbent, except such part as the Commissioners, with the consents of the Bishop, the patron, and the incumbent in some cases, and the Bishop alone, with the consent *of the patron and incumbent, in others, shall assign to the minister of the district church.

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(1) 7 C. B. 939.

(2) 78 R. R. 400 (13 Q. B. 354).

(3) 2 Hagg. Ecc. R. 30.

(4) 1 Salk. 164.

(5) 28 R. R. 390 (4 B. & C. 555).

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In this case the Bishop, in October, 1839, assigned one-half of the fees to the minister, and the other to the vicar of the parish. It is clear that that appropriation was wholly void, the Bishop having had no jurisdiction, except to assign a portion to the incumbent of the district church.

This moiety the plaintiff seeks to recover, on the ground that the district was taken out of a chapelry, whereof he was incumbent.

In order to make out this case, he must establish two propositions: First, that the alleged chapelry of St. Helen's was a legal parochial chapelry, and therefore immemorial.

In our judgment, it is not enough to prove that there was a district which was a parochial chapelry *de facto*, and that, of late years, the services in respect of which fees are claimed, were usually performed in the chapel. The Act gives the fees to the incumbent of the chapel of the chapelry, only if they were legally due and the district was a legal one.

Secondly, that there were fees due to him of right and custom, for the same services which the minister of the district church performed.

To establish or contradict the first of these propositions, a great deal of evidence was given on the trial, to three parts of which objections were taken, which we ought first to dispose of, because, in our capacity as a jury, we ought to consider the legal evidence alone.

The first piece of evidence disputed, was that of a statement by one of the witnesses, that he had heard from a former incumbent of St. Helen's, that the people of four townships, and of one in the parish of Winwick, came to the chapel. The rights of this chapel are sufficiently of a public nature, to make reputation admissible; and this appears to us to fall within this description.

The second piece of evidence was a case stated by a *deceased incumbent, Mr. Finch, for the opinion of a proctor, in which the rights to pews, and to christenings, and to burials, in a qualified way, and the nature of the repairs and other matters, are enumerated.

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This appears to us to be admissible, on the same principle as the statement of a deceased occupier, which qualifies his estate is admissible.

The third document objected to, was the answer of the incumbent of St. Helen's and other clergymen, to questions sent by the

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Bishop of Chester, for the information of the Governors of Queen Anne's Bounty, at the time when the curacy was augmented in the year 1825. These were objected to, but we think they ought to be received. The stat. 1 Geo. I. c. 2, s. 10, directing each Bishop to make inquiries as to the value of the benefice, and how it arose, and other circumstances thereof, the answers are evidence on the same principle, that an inquisition on some public matter is.

Upon all the evidence, including the three portions thus objected to and received, the question is, whether the chapelry is proved to be parochial; and to be so, it must have been coeval with the parish, that is, immemorial.

No doubt this may be inferred from modern usage, as far back as human memory goes, if there be no evidence to the contrary, according to the well-established rule by which ancient rights and exemptions are supported. And certainly there is a considerable quantity of evidence, for many years back, of the chapel having had some parochial rights. It has had baptisms, marriages, and burials, as appears by the registers, which go back as far as 1713, for the inhabitants of several townships and parts of townships, in the parish, and part of one out of it. It is called a chapelry in a faculty of 1816, and in two entries of consecration of burying ground, in the same year, as well as in the answers to the Bishop's questions prior to the augmentation of the curacy in 1825; and there is parol evidence of several witnesses to the same effect.

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On the other hand, the evidence of rights of sepulture, which Lord HARDWICKE considers to be a most strong circumstance, is in this case much weakened by the statement of Mr. Finch, that those who had breadth of ground in the churchyard buried there. The absence of chapel-wardens till very modern times (1816), and the total absence of chapel rates at all times; the statements of Mr. Finch, inconsistent with the existence of a regular chapelry, though less entitled to weight, because he had some interest to avoid the trouble of visiting the sick belonging to it, afford some arguments against this being a parochial chapelry. The presumption arising from the fact of marriages having been celebrated long ago in this chapel, is weakened by the other fact, that marriages of the inhabitants of the alleged district or chapelry have been very frequently celebrated in the mother church; and the statement of Mr. Finch, the late incumbent, is rather at variance with the supposition that this was a parochial chapelry.

But as we go back to the earlier history of the chapel, we find most cogent reasons for believing, that there was no chapel with any parochial rights in the beginning of the seventeenth century.

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The deed of feoffment of the 11 Jac. I. conveys the site of the chapel to trustees, and a schedule accompanies the deed, declaring the trusts to be, that Divine service may be continued in the chapel, which is to be repaired for the use of the neighbouring inhabitants, and the trustees are to elect lawful and fit persons to read Divine service in the chapel.

Not a word is said of the administration of the sacraments in this chapel, which would assuredly have been the case, if at that time the chapel had possessed parochial rights.

This deed creates a very strong impression that this chapel was then only a private chapel, or, at most, a chapel of ease.

This opinion is somewhat strengthened by the evidence of the parochial registers of the mother church, which contain entries of marriages, births, and burials of the inhabitants of the townships now alleged to constitute the chapelry. By the 6 & 7 Will. III. c. 6, registers are to be kept by the incumbents of parishes and precincts, in order to the better levying duties granted upon the registration. These registers in 1701 included all in the parish; if there had been a precinct or chapelry, it would not then have been so.

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Again, in one of these registers of the parish, which was admitted in evidence, by consent, there is a statement, that, in the year 1677, the incumbent of St. Helen's was a Nonconformist, and was called a preacher. I own I think this circumstance is of considerable weight, to show that this chapelry was not then a benefice, for it is well known that Nonconformists were in great numbers removed from their benefices by the Act of Uniformity, but a Nonconformist continuing in a chapel, affords a presumption that it was not then a benefice.

Upon the whole, in our character of a jury we are far from satisfied that this is a legal parochial chapelry with any parochial rights. On the contrary, our opinion is that it is no more than a chapel of ease: and therefore the judgment is for the defendant.

Judgment of nonsuit.

1850.
Feb. 9.

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(5 Ex. 91—98; S. C. 19 L. J. Ex. 166.)

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The plaintiff lent to the defendant 1,000*l.*, upon the security of an indenture, which contained a covenant by the defendant to surrender certain copyhold premises to the plaintiff's use. No surrender was made. D., who acted as attorney for both parties, signed a receipt for the money, and the title-deeds were delivered to him, and he prepared and delivered to the defendant, but without the plaintiff's knowledge, a schedule of the deeds, at the foot of which was a memorandum signed by D., acknowledging the receipt of the deeds, and undertaking to deliver them up on payment of the principal money and interest. The mortgage deed remained in D.'s possession, and he from time to time received the interest and paid it over to the plaintiff. The principal money was paid to D., who appropriated it to his own use, and died insolvent: Held, first, that D.'s receipt for the principal, and the memorandum signed by him, were admissible in evidence for the defendant. Secondly, that neither the possession of the mortgage deed nor the receipt of interest was any evidence of an authority to D. to receive the principal, and consequently, that the plaintiff was entitled to recover it from the defendant.

COVENANT on an indenture, dated the 17th of December, 1836, made between J. Candlish and W. Candlish of the one part, and the plaintiff of the other part, for payment to the plaintiff of 1,000*l.* and interest, on the 17th of December, 1840. Breach, non-payment. Plea, payment.

At the trial, before Wightman, J., at the Durham Summer Assizes, 1849, it appeared that the plaintiff, being desirous of putting out at interest the sum of 1,000*l.*, applied for that purpose to one Davison, a solicitor at Sunderland, who, on behalf of the plaintiff, advanced it to J. Candlish on the security of the above indenture, which, after reciting (amongst other things) that J. Candlish was possessed of certain copyhold premises, contained a covenant by him to surrender these premises to the use of the plaintiff. No surrender was, however, made. Davison, who acted as attorney for both parties, signed the receipt for the money. The title deeds were delivered to Davison, and he prepared a schedule of them, at the foot of which was the following memorandum: "I hereby acknowledge to have this day received into my custody and possession the several deeds and writings specified in the above schedule, and I do hereby undertake to deliver the same safe and uncanceled (unless prevented by fire or other inevitable accident), upon payment to me of the sum of 1,000*l.* and interest. 17th December, 1836. (Signed) W. C. DAVISON." This document was delivered by Davison to J. Candlish, but not in the presence or with the

knowledge of the plaintiff. The mortgage deed remained, with the *plaintiff's assent, in the possession of Davison, and some letters from the plaintiff to him were in evidence, which, it was contended, authorised him to receive the interest, which he accordingly did, and duly paid it over to the plaintiff. The principal money was paid by J. Candlish to Davison in different sums at various times, but without the plaintiff's knowledge; and upon payment of the whole, Davison delivered up the deeds, and, having appropriated the money to his own use, died insolvent. The present action was brought against the defendant, as executrix of W. Candlish, who was surety for J. Candlish, to recover the amount of the principal money. The defendant tendered in evidence the receipt of Davison of the mortgage money and the schedule and receipt of the title deeds. This evidence was objected to, but received by the learned Judge. It was then submitted, on the part of the defendant, that he was entitled to the verdict, on the ground that, the mortgage deed having been allowed to remain in the possession of Davison, and he being authorised to receive the interest, there was an implied authority for him to receive the principal. The learned Judge directed a verdict for the defendant, reserving leave for the plaintiff to move to enter a verdict for him, if the Court should be of opinion that, under the circumstances, he was entitled to recover.

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CANDLISH.
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A rule *nisi* having been obtained accordingly,

Martin and *Unthank* showed cause :

The first question is, whether the receipt for the mortgage money, and the schedule and receipt of the title deeds, were admissible in evidence. There is no doubt they were, on the ground that they formed part of the same transaction. Secondly, the repayment by the mortgagor to Davison was a payment to the plaintiff, for the deposit of the mortgage deed with Davison constituted a sufficient authority for him to receive the money. The rule of law, as adopted by the text *writers, is stated in *Whitlock v. Waltham* (1), decided in Hilary Term, 7 Anne. There "the interest of a mortgage was paid to and received by the scrivener that put out the money; the scrivener proved insolvent, and the question was, who should bear the loss. And it was admitted in this case, first, that if the scrivener be intrusted with the custody of the bond, he may receive the interest, and though he fails, yet the mortgagee shall

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CANDLISH.

bear the loss ; and that so it is also in such case, if he receive the principal and deliver up the bond ; for, being intrusted with the security itself, it shall be presumed that he is intrusted with a power over it, and with a power to receive the principal and interest ; and the rather, because the giving up of the bond upon the payment of the money is a discharge thereof ; otherwise, if the obligee take away the bond, for then he hath no authority to receive the money. Secondly, if a scrivener be intrusted with the mortgage deed, not the bond, he hath only authority to receive the interest, but not the principal, because the giving up the deed is not sufficient to restore the estate, but there must be a re-conveyance, whereas the giving up a bond is in law an extinguishment of the debt." Here no re-conveyance was necessary, for the estate never vested in the mortgagee.

(PARKE, B. : There is a covenant to surrender, which must be released ; and what authority has the attorney to release it ?)

The covenant created a mere equitable interest, which ceased on the payment of the principal money, and the delivery of the deed to the mortgagor.

(PARKE, B. : No doubt it would be a good answer to a covenant for payment of a sum certain, that the covenantor had paid the party in whose possession the deed was, and received the deed from him, for a covenant of that description is within the 4 Anne, c. 16 ; but the same rule does not apply to cases where, in order to discharge the obligation, something else *must be done. For that reason, it does not apply to a mortgage, nor to the present case, because there must be a release of the covenant to surrender.

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ALDERSON, B. : The distinction between a mortgage and a bond is not merely formal, because in the latter case, if the bond be given up, nothing more remains to be done ; but that is not so in the case of a mortgage, because there another act is to be done, which would bring the fact of payment to the knowledge of the principal. So here, if, when the money was paid, Candlish had required the plaintiff to release the covenant, the plaintiff would have asked Davison why such a request was made, and would have been told in answer, that he Davison had been paid the money. Therefore, in justice as well as law, the rule as to bonds ought not to apply to mortgages.

ROLFE, B.: *Whitlock v. Waltham* (1) is perfectly good law; but that decision arose out of a profession which does not now exist, the functions of a scrivener having in modern times been divided into that of a banker and attorney. In former times, money was left in the hands of a scrivener, who laid it out at interest, and probably never consulted his client about it. Here the money was not intrusted to Davison; he was only employed to look out for some one who had money to lend.)

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CANDLISH.

In the case of *Wolstenholm v. Davies* (2), which was decided before the 4 Anne, c. 16, the MASTER OF THE ROLLS said, "that it was the constant rule of the Court, that if the party to whom the security was made, trusted his security in the hands of the scrivener, payment to the scrivener was good payment." *Vandeleur v. Blagrove* (3) does not affect the present question. There the grantor of an annuity intrusted a person, who acted as agent of both parties, with a sum of money, for the purpose of redeeming it. The agent, without paying the money, obtained from the grantee a release of the annuity, and it was held that the loss must be *borne by the grantor. Here the fact of the security having been allowed to remain in the hands of Davison for years is evidence of an authority to receive payment of the principal money. In addition, the circumstances of the case show an actual authority. Davison from time to time received the interest, and there was an agreement whereby the delivering up of the deeds, and the payment of the 1,000*l.* were to be cotemporaneous acts; but the plaintiff allowed the deeds to remain in the hands of the person to whom the payment was to be made.

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(**PARKE, B.:** The observation of the MASTER OF THE ROLLS, in *Wolstenholm v. Davies* (2), respecting the payment of interest, applies here. He says, "And although in this case the scrivener had received the interest and part of the principal, and paid it to the obligee, yet that did not imply that he had any authority to receive it, but as long as he paid it over, all was well, and any one else might have carried to the party as well as he." So here, Davison is either the agent of the mortgagee to receive the interest, or the agent of the mortgagor to pay it; but if the plaintiff gets the money, it is no matter from whom it comes, whether from the

(1) 1 Salk. 157.

(2) 2 Freem. 289.

(3) 63 R. R. 180 (6 Beav. 565).

WILKINSON debtor or a stranger. That shows that an authority to receive the interest is no evidence of an authority to receive the principal.)
 CANDLISH.

Davison was allowed to retain the deed, and if he had altered it in a material point, it would have become void: *Pigot's case* (1), *Davidson v. Cooper* (2). The delivering up of the deed for the purpose of putting an end to the mortgage has the same effect. The continued possession of the deeds, and the authority to receive the interest, is *prima facie* evidence that Davison was agent for the purpose of receiving the principal: Story on Agency, s. 98; *Owen v. Barrow* (3).

[96] *Watson and Digby Seymour, contra*, were not called upon to argue.

PARKE, B. :

The rule must be absolute. The first question is, whether the schedule of the deeds delivered to Davison, and signed by him at the time the mortgage was executed, was receivable in evidence. Now, that document either binds Wilkinson personally, or it binds Davison. If it be considered as the act of Wilkinson binding himself, there is no question that it is receivable in evidence as part of the same transaction. If, on the other hand, it is to be considered as the act of Davison only, it is admissible on the principle that the act of a deceased person charging himself is receivable in evidence.

The question then is, what is the effect of that paper. If it was meant to be a contract with Davison, that, upon payment of the mortgage money to him, as distinguished from Wilkinson, the deeds were to be delivered up to the mortgagor, and the plaintiff knew that, it would be some evidence of an authority to Davison to receive the money. But there is no evidence that the plaintiff was present at the time the paper was signed, still less that he was cognisant of the contents of it. Therefore, supposing that to be the true construction of the document, so far there is no evidence against the plaintiff. Then, is there any other evidence to show that Davison was authorised to receive the principal money? Some letters were relied upon as showing that Wilkinson gave an authority to Davison to receive the interest, and that, no doubt, was a matter for the consideration of the jury; but an authority to receive the interest of a mortgage by no means imports an

(1) 11 Co. Rep. 26 b.

(3) 1 Bos. & P. N. R. 101.

(2) 67 R. R. 638 (13 M. & W. 343).

authority to receive the principal. A person may be willing to trust another so far as to allow him to receive a small sum, but not a large one. Then the defendant relies upon the fact of the deed, which contains a covenant to surrender *the copyhold, having been left in the custody of Davison, as constituting a sufficient authority for him to receive the principal money; and in support of that proposition the cases of *Whitlock v. Waltham* and *Wolstenholm v. Davis* were cited. Those, however, were cases of scriveners; and in the year 1702 (when the business of a scrivener was better known than now) there was a case of *Martyn v. Kingsly* (1), in the Court of Chancery, in which it is said, "A difference was made where a man trusts his scrivener (who puts out money for him) with the custody of his bond, and where with the custody of his mortgage; in the first case, if he receive the money and delivers up the bond, this shall bar the obligee; not so in the case of a mortgage, because a legal estate is vested, which cannot be divested without assignment." But, as my brother ROLFE observed, the business of a scrivener has in the present day been transferred to bankers and attornies. In the Bankrupt Act, 21 Jac. I. c. 19, s. 2, the words are, "every person who shall use the trade or profession of a scrivener, receiving other men's monies or estates into his trust or custody." A scrivener's business was to receive other men's money, and lay it out at interest, and then to receive it back again and keep it in his hands, and then to lay it out again at interest. So that the fact of intrusting a security for money the hands of such a person was evidence of an authority to receive the principal money. That such was the business of a scrivener appears from the case of *Ex parte Malkin* (2), before Lord Eldon, and also at *Nisi Prius*. Here there is no evidence to show that Davison was a scrivener in the proper sense of the word; and those cases, if they are to be considered good law, apply only to scriveners dealing with the money of their clients. But in the case of a mortgage deed deposited with a scrivener, where he clearly could not re-convey the estate, the same rule did not apply. Whether *there is any difference in the law before the statute of Anne, and since, it is unnecessary to decide. Neither is it necessary to decide what the law was, where a bond was put into the hands of a third party not a scrivener; nor whether this instrument, which is partly in the nature of a bond and partly an equitable mortgage, ranges within the one class or

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(1) Prec. in Ch. 209.

(2) 2 Rose, 27, 28; 2 V. & B. 31.

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the other, because it contains a covenant to surrender, which could not be released except by the covenantee. The next question is, whether there is any evidence of an authority to Davison to receive the principal money; and I can see none. There is nothing but an authority for the payment of interest to him, and that is no authority for him to receive the principal.

ALDERSON, B., concurred.

ROLFE, B.:

I am of the same opinion. With regard to the cases cited as to scriveners, all that is meant is, that, if a scrivener puts out money at interest in his own name, payment to him is of course good payment; but if, instead of putting out the money in his own name, he puts in the name of his client, but holds the bond, he is entitled to receive the interest, for that is taken to be the same thing as if he were dealing with it in the way of his trade.

PLATT, B., concurred.

Rule absolute.

1850.
Feb. 11.

JONES v. HUGHES AND EVANS.

(5 Ex. 104—106; S. C. 19 L. J. Ex. 200.)

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A parish vestry having resolved to borrow money for the purpose of building almshouses, the money was in 1830 advanced by the plaintiff upon the security of a promissory note payable to him, or bearer, on demand, with interest, and signed by the defendants thus: "J. H., churchwarden, J. E., overseer, or others for the time being." The interest had been regularly paid by the overseers for the time being up to 1847, but the defendants had never paid the interest, or in express terms authorised the parish officers to pay it for them. The defendants having pleaded the Statute of Limitations to an action on the note: Held, that it was a question for the jury, whether, by the form of the note, the defendants had not constituted the parish officers for the time being their agents for the payment of interest, so as to take the case out of the statute.

ASSUMPSIT on a promissory note made by the defendants, dated the 1st of May, 1830, for payment to the plaintiff's testator, David Jones, or bearer, on demand, of 185*l.* and interest. Plea, the Statute of Limitations.

At the trial, before Wightman, J., at the Liverpool Summer Assizes, 1849, it appeared that in January, 1830, at a vestry meeting of the parish of Llanrhos, in the county of Carnarvon, it was resolved that twelve almshouses be built by the parish, and that the churchwardens and overseers should raise the funds for that

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purpose by loan. The plaintiff's testator, D. Jones, advanced some of the money upon the security of the following promissory note signed by the defendants, then being two of the parish officers.

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"LLANRHOS, 1st May, 1830.

"185*l*.—We promise to pay to David Jones or bearer, on demand, the sum of One hundred and eighty-five pounds, with interest thereon from the first day of May, 1830, at the rate of 5*l*. per centum per annum, for value received, to build twelve almshouses at Towyn.

"JOSEPH HUGHES,	}	Churchwardens.	{	"Or others for the time being."
"E. ROBERTS,				
"JOHN EVANS,	}	Overseers.		
"W. EVANS, X his mark.				
"Witness—J. JONES.				

Interest on this note had been regularly paid by the overseers for the time being, up to 1847, and by them debited to the parish. The defendants had never paid any interest on the note, nor in express terms authorised the parish officers to pay it for them. Under these circumstances the learned Judge told the jury, that the defendants were entitled to a verdict, if the payment was made without their knowledge or authority. A verdict having been found for the defendants,

Watson, in last Michaelmas Term, obtained a rule *nisi* to set aside the verdict and for a new trial, on the ground of misdirection against which

Martin and *Cowling* now showed cause :

Under the 9 Geo. IV. c. 14, s. 1, in order to take a case out of the Statute of Limitations, the payment must be of such a nature as to amount to an admission of an existing debt. Here the question was left to the jury, who found that the interest *was paid without the knowledge or authority of the defendants.

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(PARKE, B. : The case of *Rew v. Pettet* (1) is in point.)

There LITTLEDALE, J., says, "It was a question for the jury, whether the defendants had adopted the payment of the interest as made on their behalf."

(PARKE, B. : Here a jury might infer, from the very form of the

(1) 40 R. R. 284 (1 Ad. & El. 196).

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note, that the defendants constituted the churchwardens and overseers for the time being their agents for the purpose of paying the interest.)

Rew v. Pettet proceeded on the ground, that there were other collateral facts showing that the defendants recognised the parish as their agents.

(PARKE, B.: Here there was certainly evidence for the jury, though it might be explained, and the learned Judge ought not to have withdrawn from the consideration of the jury the form of the note.)

Watson appeared in support of the rule, but was not called upon.

Per CURIAM (1): The rule must be absolute.

1850.
Feb. 12.

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SPOTSWOOD v. BARROW AND ANOTHER (2).

(5 Ex. 110—113; S. C. 19 L. J. Ex. 226.)

To an action for wrongfully discharging the plaintiff from the defendants' service as a traveller and salesman, the defendants pleaded that the plaintiff refused to obey the lawful and reasonable commands of the defendants with reference to the plaintiff's conduct and proceedings in the said employ, and that the plaintiff received from divers customers of the defendants, divers monies which he wrongfully appropriated to his own use; wherefore the defendants did by reason of the premises refuse to continue the plaintiff in their employ, and therefore discharged him. Replication, *de injuriâ*. At the trial, it was proved that the plaintiff had misappropriated the defendants' monies, but the fact of the misappropriation was not known to the defendants until after they had discharged the plaintiff: Held, that, the defendants having justifiable cause for discharging the plaintiff, the learned Judge was wrong in leaving it to the jury to say whether they discharged him for that cause, for that their motive and intention was not in issue under the replication *de injuriâ*.

ASSUMPSIT for the wrongful discharge of the plaintiff from the service of the defendants, as a traveller and salesman, before the expiration of the period of his engagement.

Plea, that whilst the plaintiff continued in such employ, to wit, on &c., and on divers other days and times, &c., he misbehaved and misconducted himself in this, to wit, that he wilfully, wrongfully,

(1) PARKE, B., ALDERSON, B., (1867) L. R. 2 Ex. 230, 235, 36 L. J. ROLFE, B., and PLATT, B. Ex. 124.—J. G. P.

(2) Cited in *Cowan v. Milbourn*

and improperly refused to obey the just, lawful, and reasonable commands of the defendants, with reference to the plaintiff's conduct and proceedings in the said employ, and the business thereof; and that the plaintiff, during the time aforesaid, received from divers customers of the defendants divers monies of and for the defendants, and did not nor would account for or remit the said monies to the defendants within reasonable times in that behalf, but then neglected and refused so to do, and improperly and wrongfully, and contrary to the express and lawful and reasonable commands of the defendants in this behalf, kept and detained the said monies from the defendants for long and unreasonable spaces of *time, without any just cause or excuse in that behalf; and also wrongfully and unjustly appropriated a part of the said monies to his own use, without the consent and against the will of the defendants. Wherefore the defendants afterwards, to wit, at the said time in the declaration in that behalf mentioned, did by reason of the said premises in this plea aforesaid, refuse to continue the plaintiff in their said employ, or to suffer or permit the plaintiff to travel or act as a salesman of and for the defendants, or in any other manner in their said employ, as by the plaintiff in the said declaration in that behalf alleged; and the defendants then therefore discharged the plaintiff from their employ, as they the defendants lawfully might for the cause aforesaid. Verification.

SPOTSWOOD
v.
BARROW.

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Replication, *de injuriâ*.

At the trial, before Wightman, J., at the Liverpool Summer Assizes, 1849, it appeared that, in March, 1846, the defendants agreed to employ the plaintiff as a traveller and salesman for one year, at a salary of 200*l*. The plaintiff accordingly entered the defendants' service in that capacity, and continued therein until August, 1846, when the defendants discharged him. On the part of the defendants, it was proved that the plaintiff had wrongfully appropriated certain monies which he had received for the defendants' use; but it appeared, on cross-examination, that the fact of the misappropriation did not come to the defendants' knowledge until after they had discharged the plaintiff. The learned Judge asked the jury whether the misconduct proved was the cause of the dismissal; and the jury having replied in the negative, a verdict was found for the plaintiff for 80*l*.

Wilkins, Serjt., in the following Term obtained a rule *nisi* for a new trial, on the ground of misdirection; against which

SPOTSWOOD

Knowles now showed cause :

BARROW.

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A master cannot justify *the discharge of a servant on account of misconduct unknown to him at the time of dismissal. The law is thus stated in *Cussons v. Skinner* (1) : " Where there has been disobedience or an act of misconduct by a servant, known to the master at the time he discharges him, although the master does not mention that as the precise ground of discharge, he may afterwards, by showing that the fact existed, and that he knew it, justify such discharge; but *semble*, that it is otherwise where the act of misconduct was not known to the master at the time of the discharge, as it could not then be the cause of it." This case is distinguishable from *Ridgway v. The Hungerford Market Company* (2), for there the question was not raised by the pleadings. Here the effect of the replication *de injuriâ* is to put in issue the *virtute cujus*, and consequently the direction of the learned Judge was right. In *Lucas v. Nockells* (3), BAYLEY, J., says, " Where a *virtute cujus* is a mere inference of law drawn from premises previously stated, I agree it cannot be traversed; but where it is not a legal result, but a pure question of fact, I believe all the authorities are that it may be traversed." Here the *virtute cujus* involves matter of fact, namely, the motive and knowledge of the defendants.

(PARKE, B.: *Oakes v. Wood* (4) decided, that the motive and intention with which an authority given by law is exercised cannot be inquired into under the general replication *de injuriâ*. If this plea had alleged that the defendants had notice of the plaintiff's misconduct, wherefore they discharged him, your argument might apply.

ALDERSON, B.: It is clearly settled since that case, that the motive is not in issue.)

Wilkins, Serjt., and *Atherton* appeared to support the rule, but were not called upon.

PARKE, B. :

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The replication only involved the fact of *misconduct; therefore the learned Judge was wrong in leaving to the jury what the motive of the defendants was. *Oakes v. Wood* decided that the defendant's motive or intention is immaterial, if the law justifies him in doing what he has done.

(1) 11 M. & W. 161.

(2) 42 R. R. 352 (3 Ad. & El. 171).

(3) 29 R. R. 721 (10 Bing. 193).

(4) 2 M. & W. 791.

ALDERSON, B. :

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All that is in issue is, whether the defendants had a justifiable cause for doing the act complained of.

ROLFE, B. :

The subject may be illustrated by what was said in *Doe d. Daniell v. Woodruffe* (1), viz. "Where a party having a right of entry, enters, it is not competent for him to repudiate any rights he may possess, and to say he has entered as a trespasser, or by some other than his real title. As soon as he has entered he is possessed, whether he will or no, by virtue of every title which he had in him, and which he could assert by entry." Littleton, sect. 695, is there referred to; and that old authority seems to me to be founded on very good sense.

PLATT, B., concurred.

Rule absolute.

THE NORTH WESTERN RAILWAY COMPANY v.

1850-51.

M'MICHAEL.

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THE BIRKENHEAD, &C. RAILWAY COMPANY v.

PILCHER.

(5 Ex. 114—128; S. C. 20 L. J. Ex. 97; 15 Jur. 132; 6 Rail. Cas. 618.)

To an action for calls on railway shares, the defendant pleaded that the Company, in pursuance of the defendant's application, granted the shares to him as the original holder thereof, and entered his name in the register of shareholders as the proprietor thereof, and so the defendant became and still is the original holder of the shares by contract with the Company, and not otherwise; that, when the shares were granted to him, and his name entered as aforesaid, and also at the respective times of making the calls, the defendant was an infant; that he never ratified or confirmed the said application, grant, entry, and proprietorship, but the same have hitherto remained wholly unratified and unconfirmed; that he has not at any time derived any profit, benefit or advantage whatsoever from the shares or by reason of his being the proprietor thereof, and such proprietorship has always been wholly unprofitable and useless to the defendant: Held, on general demurrer, that the plea was bad for want of an averment that the defendant had repudiated the contract, or, at least, that he continued a minor.

Semle, that an infant, even in the case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession and has not disclaimed; at all events, unless he still continues a minor.

Where nothing but the simple fact of infancy is pleaded to an action for railway calls against a purchaser who has been registered, and thereby

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WESTERN
RAILWAY CO.
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BIRKEN-
HEAD, LAN-
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JUNCTION
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become a shareholder in a permanent character, the interest continuing to be vested in the infant, and the subsequent obligation to pay, such a plea is insufficient. Therefore, where, to a declaration for railway calls, the defendant pleaded, that, at the time when he first became the holder of the shares, and at the time of his making the contracts by force of which the debts, causes of action, and liabilities in the declaration mentioned accrued to the plaintiffs and were incurred by the defendant, and at the time of his making and entering into the contracts by force of which the plaintiffs claim to be entitled by law to make the call upon the defendant, as in the declaration alleged, the defendant was an infant within the age of twenty-one years: to which the plaintiffs replied, that the defendant, at the time when he first became the holder of the shares, and at the time of his making the contracts in the plea mentioned, was of the full age of twenty-one years; upon which issue was joined, and a verdict entered for the defendant: Held, that the plaintiffs were entitled to judgment *non obstante veredicto*.

THE first of these cases was an action of debt. The first count of the declaration stated, that the defendant is the holder of divers, to wit, ten shares, in the said Company, and is indebted to the plaintiffs in a large sum of money, to wit, 112*l.* 10*s.*, in respect of divers, to wit, six calls on each of the said shares, to wit, a certain call of 1*l.* 10*s.* on each of the said shares, a certain other call &c. (stating them); whereby an action hath accrued to the plaintiffs by virtue of the "Companies Clauses Consolidation Act, 1845," and the "North Western Railway Act, 1846," to demand from the defendant the said sum.

The second count was for interest, and money due on an account stated.

Plea to the first count. That, before the making of any of the calls in the declaration mentioned, to wit, on &c., the defendant applied to the Company to become the holder of ten shares in the Company; and the Company then, to wit, on &c., in pursuance of the defendant's application, granted the shares in the declaration mentioned, to him, as the original and first holder thereof, and then entered his name in the register of shareholders in the Company as the proprietor of the said shares; and so the defendant then became and still is the original and *first holder of the shares in the declaration mentioned, by contract with the Company, to wit, in manner aforesaid, and not otherwise; and the proprietorship of the said shares, acquired as in this plea aforesaid, is the same proprietorship of the said shares in the declaration mentioned. That, when the defendant applied as aforesaid, and when the shares in the declaration mentioned were granted to him and his name entered as aforesaid, and also at the respective times of the making of the calls in the first count mentioned, the defendant was an

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infant within the age of twenty-one years, to wit, of the age of twenty years. That the defendant has never ratified or confirmed the said application, grant, entry, and proprietorship, or any or either of them, but the same have, and each and every of them hath hitherto always remained, wholly unratified and unconfirmed. That the defendant has not at any time derived any profit, benefit, or advantage whatsoever from the said shares or by reason of his being proprietor thereof, and such proprietorship has always been wholly unprofitable and useless to the defendant. Verification.

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WESTERN
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M^r MICHAEL.
BIRKEN-
HEAD, LAN-
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JUNCTION
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There was a similar plea to the second count.

General demurrer to both pleas, and joinder therein.

Willes, in support of the demurrer :

The fact of the defendant being an infant at the time when the shares were allotted to him, and also at the time of making the calls, affords no answer to the action. The plea does not state any refusal or renunciation of the shares. If this is to be treated simply as an action on a contract between the Company and the infant, it may be conceded that the plea is good; but if, on the other hand, it is assimilated to the case of a purchase by an infant of an estate in respect of which rent is to be paid, the plea is bad. It is * submitted that the case must be decided by analogy to the latter. An infant has clearly a capacity to purchase: Co. Litt. 2 b. The 8 & 9 Vict. c. 16, s. 79, also contemplates the case of an infant shareholder. The purchase of shares is an engagement by the infant to take the property purchased, which, by Act of Parliament, is subject to the contingency of the Company calling for payment by instalments, the infant having the option, at any time before action brought, to renounce the benefit and so get rid of the burthen. The Legislature has attached to these shares certain incidents, which render them analogous to chattels real; and if an infant takes a lease, though at an extravagant rent, he is bound to pay it unless he renounce, for he has the remedy in his own hands. [He cited *Ketsey's* case (1), *Kirton v. Elliott* (2), *The Leeds and Thirsk Railway Company v. Fearnley* (3), *Holmes v. Blogg* (4), *The Cork and Bandon Railway Company v. Cazenove* (5), and *The Newry and Enniskillen Railway Company v. Coombe* (6).]

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(1) Cro. Jac. 320.

(2) 2 Bulst. 69.

(3) 80 R. R. 468 (4 Ex. 26).

(4) 19 R. R. 445 (2 Moore, 552).

(5) 74 R. R. 553 (10 Q. B. 935).

(6) 77 R. R. 736 (3 Ex. 565).

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The only difference between the present case and that of *The Leeds and Thirsk Railway Company v. Fearnley*, where the plea of infancy was held bad, is, that in the latter it was not averred that the defendant became a shareholder by contract with the Company. The Court will not infer that the defendant was an infant at the time the calls became due; and it should have been alleged that the disability continued up to that time. The allegation, that the defendant "has never ratified or confirmed the application," is immaterial, inasmuch as he is liable unless he has repudiated. It is further alleged, that "he has not at any time derived any profit, benefit, or advantage whatsoever from the shares, but *non constat* that they are not of value in the market. This is not a duty arising from contract, but is founded on the statute, and it makes no difference whether the shares are acquired by purchase or by bequest. It is not like the case of an ordinary partnership, because there the shares are not transferable without the assent of the copartners. (He also referred to the 18th section of the 8 & 9 Vict. c. 16.)

Cleasby, contra :

Enough is stated in this plea to render the defence of infancy available. It is shown that the defendant became a shareholder by contract, and it is unnecessary to add that he repudiated. *The Newry and Enniskillen Railway Company v. Coombe* only decided that a plea containing both allegations was good.

(ALDERSON, B. : This Court has held that the property of these Companies is money, which, in order to make it profitable, is intrusted to the corporation, who have an unlimited power of converting part of it into land, part into goods, and of changing and disposing of each from time to time, for the purpose of obtaining a surplus profit for the individual contributors: *Bligh v. Brent* (1).)

[*119] The purchaser gets no * tangible property, only a right: *Humble v. Mitchell* (2). Upon these pleadings, it must be taken that the defendant continued a minor, because the defence set up is infancy at the time the contract was entered into; and if, in order to get rid of that *primâ facie* defence, it is necessary to show a different status, that should come by way of replication, and then the

(1) 47 R. R. 420 (2 Y. & C. 268).

(2) 52 R. R. 318 (11 Ad. & El. 205),

defendant would have an opportunity of rejoining that he had repudiated the contract. In *Kirton v. Elliott*, the Court assumed that the defendant was of full age; but how that was warranted does not appear. An infant is not supposed, *à priori*, when he becomes of age, to know what obligations he has entered into. In Bac. Abr. "Infancy and Age," (G), it is said, "The rights of infants are much favoured in law, and regularly their *laches* shall not be prejudicial to them, upon a presumption that they understand not their right, and that they are not capable of taking notice of the rules of law, so as to be able to apply them to their advantage." A minor need not repudiate during infancy, and when he is of age, he may not know whether he ought to repudiate or not. If there is no semblance of benefit from the contract, it cannot be enforced, as in the case of a lease by an infant rendering no rent: Bac. Abr. "Infancy and Age," (I) 7. In *The Cork and Bandon Railway Company v. Cazenove*, the continued possession or non-repudiation of the shares was considered equivalent to a ratification at full age. Here there is an express averment that the defendant has never ratified; so that, even if he could be taken to ratify by not repudiating, that does not apply here. Then how can he be liable, when he has done no act? This is not like the purchase of land, in which case the continuing in possession after full age is a tacit confirmation of the purchase, since it is to turn to his advantage: Bac. Abr. "Infancy and Age," (I) 8. * * Here it is sought to make the omission to repudiate equivalent to a ratification. The proper mode of avoiding a contract by an infant, is by pleading the special matter: Bac. Abr. "Infancy and Age," (I) 7; *Gibbs v. Merrill* (1). In *Williams v. Moor* (2), PARKE, B., in delivering the judgment of the Court, says, "The contract of an infant for goods sold and delivered (not being necessities), is as completely void as his contract on an account stated, if by the word 'void' is meant incapable of being enforced." Then how can his omission to do any act be regarded as a ratification? *Kelsey's* case, in Cro. Jac., is evidently the same as that reported in Brownlow as *Kelsey's* case, and in Bulstrode as *Kirton v. Elliott*; and while in the former report, the case seems to have been decided on the ground that the infant continued in possession of the land after he was of full age, from the latter it would seem that simple possession was considered enough to render him liable. The same case is thus stated in Roll. Abr. "Enfants," (K): "If a lease for years

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(1) 2 Taunt. 307.

(2) 11 M. & W. 256.

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be made to an infant, rendering rent, the rent is in arrear, and then the infant comes of full age, and afterwards continues the occupation of the land; this shall make him *chargeable with the arrears incurred during his infancy."

(PARKE, B.: In *Maddon v. White* (1), BULLER, J., said, that "Lord MANSFIELD, in the case of *Drury v. Drury* (2), laid it down as a general principle, that if an agreement be for the benefit of an infant at the time, it shall bind him; Lord HARDWICKE afterwards adopted this rule.")

That case is found in Wilmot's Notes of Opinions and Judgments, p. 181; and where land vests in an infant, the maxim, "*transit terra cum onere*" applies. This case differs from an action of debt for rent, for that is not founded entirely on contract, but also on actual occupation.

Willes, in reply, cited *Townson v. Tickell* (3).

Cur. adv. vult.

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The case of *The Birkenhead, Lancashire, and Cheshire Junction Railway Company v. Pilcher*, was also an action of debt for calls. The declaration stated, that the defendant was and still is the holder of divers, to wit, 180 shares in the said Company, and being such holder, was and still is indebted to the said Company in a large sum of money, to wit, 300*l.*, in respect of a call made on the said shares; whereby &c., an action hath accrued to the plaintiffs, by virtue of the Companies Clauses Consolidation Act, 1845, *and the Birkenhead, Lancashire, and Cheshire Railway Act, 1846, to demand from the defendant the said sum, &c.

Plea, that, at the time when he the defendant first became and was the holder of the said shares, and at the time of the making and entering into by him the defendant of the contracts by the force, virtue, and in pursuance of which the debts, causes of action, and liabilities, and each and every of them in the said declaration mentioned, have accrued to the plaintiffs and been incurred by the defendant, as in the said declaration is alleged, and at the time of the making and entering into by him the defendant of the contracts by the force, virtue, and in pursuance of which the plaintiffs claim

(1) 1 R. R. 453 (2 T. R. 159).

Br. P. C. 492.

(2) Dom. Proc. 26th May, 1762; 3

(3) 22 R. R. 291 (3 B. & Ald. 31).

to be entitled by law to make the said call upon the defendant, and to demand and have the amount of the same of and from the defendant, in manner and form as in the said declaration is alleged, he the defendant was an infant, within the age of twenty-one years. Verification.

Replication, that the defendant, at the time when he first became and was the holder of the said shares in the said declaration mentioned, and at the time of the making and entering into by him the defendant of the said contracts, and every of them in the said plea mentioned, was of the full age of twenty-one years, and not within the age of twenty-one years, to wit, of the age of nineteen years. Conclusion to the country and issue thereon.

A verdict having been entered for the defendant on this issue, pursuant to leave reserved at the trial,

Welsby obtained a rule *nisi* for judgment *non obstante veredicto*, on the ground that the plea was bad ; against which

Willes appeared to show cause (Dec. 3, 1850), and *Welsby* to support the rule.

They relied upon the arguments urged in the preceding case.

Cur. adv. vult.

The judgment of the Court in both the above cases was, on the 11th of January, 1851, delivered by

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PARKE, B. :

The question to be decided in the case of *The North Western Railway Company v. M'Michael* is, whether the first plea (the second to the second count being identical) contains a good *prima facie* answer to the declaration. If the effect of a person actually becoming a shareholder in a Railway Company, by original agreement with the Company, ought to be treated as a mere contract with those to whom the proposal was made, for a future partnership with the persons who should be afterwards fixed upon by them, and to contribute to the capital for carrying on the undertakings in a certain proportion, such a contract could not be presumably beneficial to an infant, and would be, as all mere contracts, except for necessities, are, not binding on the infant at all ; and the simple fact, that the defendant at the time he made the contract was an infant, would be an answer to an action upon it. The same may

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be said of an executed contract for the purchase of a mere personal chattel. But in the cases already decided upon this subject, infants, having become shareholders in Railway Companies, have been held liable to pay calls made whilst they were infants (1). They have been treated, therefore, as persons in a different situation from mere contractors, for then they would have been exempt; but, in truth, they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the Company, or purchase or devolution from those who have contracted, and with certain obligations attached to it, which they were bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate, who has *taken possession, and thereby becomes liable to all the obligations attached to the estate, for instance, to pay rent (2) in the case of a lease rendering rent, and to pay a fine due on the admission, in the case of a copyhold to which an infant has been admitted (3), unless they have elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so: Bac. Abr. "Infancy and Age," (1) 5; Co. Litt. 980. This Court accordingly held, in *The Newry and Enniskillen Railway Company v. Coombe* (4), that an infant who did avoid the contract of purchase during minority, was not liable to pay any calls. In the subsequent case of *The Leeds and Thirsk Railway Company v. Fearnley* (5), where there had been no waiver or repudiation of the purchase, we held, in conformity with the decision of the Queen's Bench, that the defendant continued liable. We cannot say that we concur in the opinion of that Court, as reported in 11 Jur. 802, and 10 Q. B. 985, if it goes to the full extent that all shareholders, including infants, are by the operation of the Railway Acts made absolutely liable to pay calls. No doubt the statute not only gave a more easy remedy against the holder of shares by original contract with the Company, for calls, and also attached the liability to pay calls to the shares, so as to bind all subsequent holders; but we consider, as we have before said, that there are implied exceptions in favour of infants and lunatics in statutes containing general words, (*Stowell v. Lord Zouch* (6)), though that depends, of course, on the intent of the Legislature in

(1) *The Cork and Bandon Railway Company v. Cazenove*, 74 R. R. 553 (10 Q. B. 935); *The Leeds and Thirsk Railway Company v. Fearnley*, 80 R. R. 468 (4 Ex. 26).

(2) 21 Hen. VI. 31 b.

(3) *Evelyn v. Chichester*, 3 Burr. 1717.

(4) 77 R. R. 736 (3 Ex. 566).

(5) 80 R. R. 468 (4 Ex. 26).

(6) Plowd. 364.

each case, (see Wilmot's Notes of Opinions and Judgments, p. 194, *The Earl of Buckinghamshire v. Drury*), and that this statute did not mean, by general words, to deprive infants of the protection which the law gave them, against improvident *bargains. Under this statute, therefore, our opinion is, that an infant is not absolutely bound, but is in the same situation as an infant acquiring real estate, or any other permanent interest: he is not deprived of the right which the law gives every infant, of waiving and disagreeing to a purchase which he has made; and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the call was due. (See Bac. Abr. "Infancy and Age," (I) 8.) The law is clearly laid down in Co. Litt. 2 b: "An infant or minor hath, without consent of any other, capacity to purchase, for it is intended for his benefit; and, at his full age, he may either agree thereunto and perfect it, or, without any cause to be alleged, waive or disagree to the purchase; and so may his heirs after him, if he agreed not thereunto after his full age." A shareholder, indeed, in a Railway Company, or other chartered corporation, is not thereby made a holder of real estate: *Bligh v. Brent* (1); for all real estates are vested in the corporate body, not in the individuals composing it; but the shareholder acquires, on being registered, a vested interest of a permanent character, in all the profits arising from the land, and other effects of the Company, and, when registered, may be deemed a purchaser in possession of such interest, and is placed in a position analogous to that of a purchaser in possession of real estate.

When, therefore, there is nothing but the simple fact of infancy pleaded to an action for calls against a purchaser who has been registered, and thereby become a shareholder in a subject of a permanent character, the interest continuing to be vested in the infant, and the consequent obligation to pay, the simple plea of infancy is, according to the above authorities, insufficient; and on that ground we *think the plea in the case of *The Birkenhead Railway Company v. Pilcher*, which we have to consider with this, bad, notwithstanding the verdict, and therefore are of opinion that the rule should be absolute to enter up judgment for the plaintiffs in that case, notwithstanding the verdict entered for the defendant.

But the case of *The North Western Railway Company v. M'Michael* contains, besides the averment of infancy at the time of the

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contracts for the shares, other special facts,—not a waiver by the infant, but averments that he had derived no advantage from the shares, and had never ratified or confirmed the purchase. This case is one of more difficulty.

The law upon this subject is to be found as early as 21 Hen. VI. 31 B, where it was held by NEWTON, J., that, if an infant lessee takes possession, he is bound to pay the rent; and in conformity with that ruling was the decision in a case reported in Brownlow, 120, as *Ketley's* case; Cro. Jac. 320, as *Kelsey's* case; 2 Bulst. 69, as *Kirton v. Elliott*; and in Roll. Abr. 731, as *Kettle v. Elliott*. The case is most fully reported in Brownlow. It was an action of debt for rent; the defendant pleaded his infancy at the time of the lease made, in bar; and it was argued, on demurrer to the plea, that the defendant should be charged, because by the lease made he is become a purchaser, and so to be, in judgment of law, as a man of full age.

We collect that the principle upon which the Court decided was, that, every purchase being presumably for the benefit of the infant, his purchase vested the estate in him on entry and taking possession, and rendered him liable to the obligations attached to it, until he disagreed to the estate, and thereby caused the conveyance to be inoperative, and avoided the obligation to pay rent. In referring to this case, the passage in Bac. Abr. "Infancy," (I) 8, treats the infant as being bound by reason of acquiescence after full age. How that could be collected from the reports of the case is not clear; and so Lord ELLENBOROUGH, *in *Baylis v. Dineley* (1), intimates an opinion that a lease is equivocal, whether for the benefit of the infant or not, and that, if he continues a possessor after age, he adopts it; and this was a part of the argument for the defendant at the Bar. But it seems to us to be the sounder principle, that, as the estate vests, as it certainly does, the burthen upon it must continue to be obligatory until a waiver or disagreement by the infant takes place, which, if made after full age, avoids the estate altogether, and reverts it in the party from whom the infant purchased; if made within age, suspends it only, because such disagreement may be again recalled when the infant attains his majority.

But then arises a question of difficulty, whether the fact that this particular purchase was a disadvantageous one, is an answer, the estate still being vested in the infant. We are disposed to

think that the plea does not sufficiently state that the contract was a losing one, or that the shares were not worth what the defendant agreed to pay, which they well might be, though the defendant himself had actually made no profit by them; but supposing the averment to be sufficient in that respect, we still think the plea bad.

This question appears to have been discussed in the case of *Ketley*, as reported in *Bulstrode*, HAUGHTON, J., expressing an opinion, that if the lease was for an acre at 100*l.* per annum, and the infant occupy and enjoy it, he is to be charged with the rent, he being here taken to be a purchaser; but DODDERIDGE said, that if a greater rent was reserved than the land was worth, that then, peradventure, the infant should not be charged. This opinion is more strongly expressed in the report in *Brownlow*. This is certainly a point of some nicety; but the question may be asked, why, in such a case, does not the infant disagree to and avoid the purchase, and so get rid of the obligation? *and is it reasonable, that he should retain the estate and prevent the owner from having any use of it, and not be liable to the burthen, though disproportionate? It may be answered, that whilst he is an infant he is incompetent to decide whether he ought to waive the purchase or not, and in the meantime, he ought to be at liberty, or his guardian for him, to get rid of the liability, by showing that it was a prejudicial contract. But if so, such a plea would not be good if the infant had attained his majority, for then, clearly, he ought to disclaim it, and thereby give back the estate; and to make such a plea good, where there is no disclaimer averred, it ought to appear that the infant is not yet of age. The plea, as it stands, is by no means free from doubt. We think, however, the more reasonable view of the case is, that the infant, even in the case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession, and has not disclaimed,—at all events, unless he still be a minor. We think that the defendant is in a situation analogous to that, unless he disclaims the interest, and so avoids the transaction altogether. He cannot keep the interest, and prevent the Company from having it, and dealing with it as their own, without being liable to bear the burden attached to it. For these reasons we think the plea is bad, and there must be judgment for the plaintiffs.

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Judgment for the plaintiffs.

IN THE EXCHEQUER CHAMBER.

M'CLURE v. RIPLEY.

(5 Ex. 140—146; S. C. 19 L. J. Ex. 194.)

[THIS case is reported along with *Ripley v. M'Clure* in vol. 80, p. 606.]

ASHPITEL v. SERCOMBE.

(5 Ex. 147—166; S. C. 19 L. J. Ex. 82; 6 Rail. Cas. 224.)

1849.
June 16.
1850.
Feb. 7.
[147]

In July, 1845, a Railway Company was provisionally registered, and a prospectus issued, headed: "Capital, 2,500,000/., in 100,000 shares of 25/ each." On the 6th of October, 1845, the plaintiff applied for 200 shares by letter, in which he said, "I agree to accept the same or any portion thereof, subject to the provisions of the subscribers' agreement; and I further agree to execute the same and any other agreement or deeds, and to pay the deposit when required." On the 11th of October a letter of allotment of 100 shares was sent to the plaintiff, containing notice to pay the deposit on or before the 20th of October, and adding—"I beg also to inform you, that scrip for the shares will be delivered to you in exchange for this letter and receipt, upon your executing the Parliamentary contract and subscribers' agreement, which lies here for signature until further notice, and afterwards at such other places as will be hereafter notified." The plaintiff, who resided at Exeter, paid the deposit on the 20th of October, and on the 3rd of December the subscribers' agreement was sent to Exeter, and the plaintiff had an opportunity of executing it, but did not. It did not appear, however, that he was called upon to execute it, nor that any notice was given to him that the deed was at Exeter. The subscribers' agreement, which bore date the 15th of October, authorised the directors to take such measures and incur such preliminary expenses as they might think advisable, to increase or diminish the capital of the Company, to extend the railway, or, if they should think fit, to abandon the undertaking. It also specially authorised them to apply the deposits in payment of the expenses, and the deposits were so applied; but the undertaking was abandoned in consequence of the allottees not furnishing sufficient funds to carry it on, and without any fraud or misconduct on the part of the managing committee. On the winding up of the concern, a committee of inquiry had been appointed, and the defendant, one of the managing committee, handed to them the minute-book, containing an entry made by the secretary of the Company in the course of his duty, of a certain resolution proposed by the defendant at a meeting of the committee of management. In an action by the plaintiff to recover back his deposit as upon a failure of consideration, the learned Judge ruled that this resolution was evidence against the defendant, and he told the jury that, if they thought that the project had been abandoned as abortive at the time the action was commenced, they should find for the plaintiff. On a bill of exceptions to this ruling: Held, that the learned Judge was right in admitting the resolution in evidence (1).

THIS was a bill of exceptions to the ruling of CRESSWELL, J., on the trial of the cause at the Devonshire Spring Assizes, 1847.

(1) There was another ground of exception, that the ruling of the learned Judge was wrong. So much of the report as relates thereto is omitted.—J. G. P.

The action was brought by the defendant in error, the allottee of shares in a projected Railway Company, to recover 262*l.* 10*s.*, being the amount of his deposits, the scheme having proved abortive. The declaration was in *assumpsit* for money had and received, and the defendant pleaded *non assumpsit*, upon which issue was joined.

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The material facts stated in the bill of exceptions to have been proved on the part of the plaintiff, [are summarised in the judgment of the COURT].

The case was argued (1) (June 16, 1849,) by

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Crowder (*Montague Smith* with him), for the plaintiff in error. * * *

Butt (*Greenwood* with him), for the defendant in error. [He cited *Alderson v. Clay* (2).]

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Crowder replied. [He cited *Burnside v. Dayrell* (3).]

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Cur. adv. vult.

The judgment of the COURT was now delivered by

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PATTESON, J. :

This was an action for money had and received, brought by the plaintiff, an allottee of shares in a proposed Railway Company, which had been abandoned before the commencement of the action, without any fraud or misconduct, against the defendant, one of the managing committee, to recover back the plaintiff's deposit. The plaintiff applied for shares on the 6th of October, 1845, by letter, in which he says, "I agree to accept the same, or any portion thereof, subject to the provisions of the subscribers' agreement; and I further agree to execute the same, and any other agreement or deeds, and to pay the deposit when required." On the 11th of October, a letter of allotment was sent to the plaintiff, containing notice to pay the deposit on or before the 20th of October, and adding, "I beg also to inform you, that scrip for the shares will be delivered to you, in exchange for this letter and receipt, upon your executing the Parliamentary contract and subscribers' agreement, which lies here (11, Clement's Lane, London) for signature until further notice, and afterwards at such other places as will be

(1) Before Patteson, J., Coleridge, J.,
Maule, J., Cresswell, J., Wightman, J.,
Erle, J., and Williams, J.

(2) 1 Stark. 405.

(3) 77 B. R. 612 (3 Ex. 224).

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hereafter notified." The plaintiff resided at Exeter. He paid the deposit on the 20th of October, as required. On the 3rd of December, the subscribers' agreement was sent to Exeter, and the plaintiff had an opportunity of executing it, but did not. It was not, however, proved that he was called upon to execute, *nor that any notice was given to him that the deed was at Exeter. The subscribers' agreement authorises the directors to take such measures, and incur such preliminary expenses, as they may think advisable; also to extend the railway, or, if they shall think fit, to abandon the undertaking; and it also specially authorises them to apply the deposits in payment of the expenses; and the deposits have been so applied; but the undertaking was abandoned, in consequence of the allottees not furnishing sufficient money to carry it on.

On the trial of the cause, a bill of exceptions was tendered to the learned Judge, by the learned counsel for the defendant, on two grounds. The first ground was, that he had received in evidence a certain resolution, to which it was urged that the defendant was not sufficiently shown to be a party. It appeared that, on the winding up of the concern, a committee of inquiry had been appointed, and the defendant had handed to them the minute-book, containing the resolution in question, as part of the proceedings of the directors. We think this an abundant recognition by the defendant, and that the learned Judge was quite right in admitting the evidence.

* * * * *

Judgment affirmed.

IN THE COURT OF EXCHEQUER.

OWEN v. DE BEAUVOIR (1).

(16 Meeson & Welsby, 547—568.)

1847.
Feb. 10.
April 20.
[16 M. & W.
547]

Replevin for distraining a cart on 13th May, 1845. Avowry, (under 11 Geo. II. c. 19, s. 22), that the *locus in quo* was parcel of a tenement called H., holden of the manor of S. M., by fealty and rent of 9s. yearly, to be paid at Old Michaelmas in every year, of which manor defendant, at the time when &c. was the owner, and that, because plaintiff occupied the *locus in quo* at the time when &c., and because 2l. 14s. of the rent aforesaid for six years, ending at Old Michaelmas, 1844, was in arrear, defendant well avows the taking the said cart, &c. Pleas in bar: first, that the *locus in quo* was not

(1) See *Lord Zouche v. Dalbiac Earl of Harrington* [1893] 2 Ch. 497, (1875) L. R. 10 Ex. 172, 44 L. J. Ex. 504, 507, 62 L. J. Ch. 571, 68 L. T. 109; *Irish Land Commission v. Grant* 703.—J. G. P. (1884) 10 App. Cas. 14, 27; *Howitt v.*

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parcel of the manor of S. M.; second, that it was not holden of that manor; third, that defendant was not owner and possessed of that manor; fourth, that no rent was in arrear. Issues thereon. H. farm was holden of the manor of S. M., at an ancient freehold rent of 9s. per annum, payable at Michaelmas, yearly. All arrears to Michaelmas, 1824, were paid in January, 1825. No other payment took place, but, after repeated applications for the rent in several years before Michaelmas, 1844, the lord distrained in May, 1845, for six years' rent due at Michaelmas, 1844: Held, first, that, by the operation of 2 & 3 Will. IV. c. 27, sections 2, 3, and 34 (1), the rent was extinguished by the lapse of twenty years from the day on which the last payment was made; and, second, that the bar thus interposed by that Statute of Limitations need not be specially pleaded, and might be given in evidence on the plea in bar of *non tenuit*.

In replevin, the Judge's opinion at the trial was in favour of the defendant, so that he had no occasion to tender a bill of exceptions; but leave was given to move to enter a verdict for the plaintiff. The COURT afterwards entered a verdict for the plaintiff. The effect was to extinguish the rent, the subject-matter of the avowry, without leaving any means of reviewing the judgment. The COURT inclined to grant a new trial, but recommended a special verdict, in order to carry the case at once into a court of error, which was afterwards consented to, on terms.

REPLEVIN for a cart distrained in a certain barn, in the parish of West Ilsley, in Berkshire. Avowry, that the defendant well avows the taking of the said cart, goods, and chattels in the said declaration mentioned, in the said barn in which &c., and justly &c., because he saith that at the said time when &c., the said barn in which &c., was parcel of a certain tenement called Hodcott Farm, otherwise Hodcott, with the appurtenances, situate and being in the county of Berks, and holden of the manor of Stratfield Mortimer, within the said county, by fealty, and the rent of nine shillings yearly, to be paid at the feast-day of St. Michael in every year, according to the Old Style and computation of time formerly used in this kingdom, of which said manor the defendant before and at the time when &c. was the owner, and thereof lawfully possessed; and because the plaintiff held and occupied the said barn, with the appurtenances, in which &c., at the *time when &c., and because the sum of 2l. 14s. of the rent aforesaid for six years next before and ending at the feast-day of St. Michael, which was in the year of our Lord 1844, according to the said Old Style, at the said time when &c. was then due, in arrear, and unpaid, to the defendant, he the defendant well avows the taking of the said mentioned cart, goods, and chattels, in the said barn in which &c., so being parcel of the aforesaid tenement called Hodcott Farm, otherwise Hodcott, with the appurtenances, and holden of the said manor of Stratfield Mortimer, as aforesaid, and justly &c., as a distress for the aforesaid rent so

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then being due, in arrear, and unpaid to the defendant, according to the form of the statute in such case made and provided. Verification, and prayer of judgment, and a return of the said cart, goods, and chattels, together with defendant's damages, costs, and charges in this behalf, according to the form of the statute in such case made and provided, to be adjudged to him &c.

Pleas in bar: First, that by reason of anything in the said avowry alleged, the defendant ought not to avow the taking of the said cart, goods, and chattels in the said declaration mentioned, in the said barn in which &c., and justly &c., because the plaintiff says, that the said barn in which &c. was not parcel of the said tenement called Hodcott Farm, otherwise Hodcott, in manner and form as in the said avowry alleged; concluding to the country. Second, that the said barn in which &c. was not holden of the said manor, in manner and form as in the said avowry alleged; concluding to the country. Third, that the defendant was not the owner and possessed of the said *manor, in manner and form as in the said avowry alleged; concluding to the country. Fourth, that no part of the said rent was due or in arrear, in manner and form as in the said avowry alleged; concluding to the country. Issues thereon.

At the trial, at the last Berkshire Assizes, before Maule, J., it was proved for the defendant, that for the period, between Michaelmas, 1784, and Michaelmas, 1824, the yearly rent in question had been paid for Hodcott Farm by its owners, or their tenants in possession, to the defendant and his ancestors, lords of the manor of Stratfield Mortimer, as held in free tenure of that manor. On 15th January, 1825, eight years' arrears, due at Michaelmas, 1824, were paid by the then occupier, by direction of his landlord, to the defendant's agent. Repeated applications on behalf of the defendant were afterwards made for payment of subsequent arrears, but without success; and on the 15th May, 1845, the defendant distrained on the plaintiff's cart, while standing in a barn, shown to be parcel of Hodcott Farm, for six years' arrears, due at Michaelmas, 1844. The defendant tendered evidence to prove the existence of the manor, and its having been in his possession and that of his ancestors for more than sixty years, when the plaintiff's counsel interposed, contending that the "right and title" of the defendant to the rent was extinguished by lapse of time, under the operation of 3 & 4 Will. IV. c. 27, ss. 2, 3, and 34, which transferred the estate in the rent to

the plaintiff. For the defendant it was answered, first, that the twenty years mentioned in sections 2 and 3 began to run, not from the time the last payment of rent was made, but from Michaelmas, 1825, till which time no rent was due, so that the right to distrain or sue for any *arrear of the rent "first" accrued to the defendant then, viz within twenty years before the distress was taken; and secondly, that if it did not, the plaintiff should have pleaded specially in bar, that the right to make the distress did not first accrue to the defendant within twenty years next before the distress was in fact made, or in the terms used in *James v. Salter* (1). MAULE, J., expressed his opinion in favour of the defendant on the first point, and was inclined to think that, if the statute did in fact operate as a bar, it should have been pleaded. He also noticed, that sect. 34 did not provide anything as to arrears of the rent extinguished by it. And he directed a verdict for the defendant, with leave to move to enter a verdict for the plaintiff for 4*l.* 4*s.* (the costs of the replevin bond). Verdict for the defendant, for 2*l.* 14*s.* the amount of the six years' arrears, the cart being found to be of the same value.

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In Michaelmas Term last, *Whateley* moved according to the leave reserved:

Sections 2 and 3 show that the only question is, when the last payment was made. That question is raised by the last plea in bar, viz. of *riens in arrear*.

(PARKE, B.: No; that plea admits the rent to be existing, but says it has been satisfied by payment or otherwise; whereas the effect of sect. 34 is to extinguish the estate in the rent altogether; so that, at the time of the distress, the tenement would not be held subject to such rent.

ALDERSON, B.: The plea admits there is a rent, but says it is not in arrear; whereas the plaintiff's point is, that there is no such rent, not that he did not hold.

ROLFE, B.: The plea admits that the plaintiff holds at a rent of 9*s.*, payable at Michaelmas.)

The plaintiff contends that no rent is in arrear, because it has been extinguished by the operation of the Act.

(ROLFE, B.: According to that argument, *non tenuit* would always be a superfluous plea, where *riens in arrear* is pleaded.

(1) 43 B. R. 741 (3 Bing. N. C. 545, 550; 2 Bing. N. C. 505, 507, *S. C.*).

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PARKE, B. : The plea of *riens in arrear* lets in any defence that the rent *is satisfied by payment, by accord and satisfaction, or otherwise, consistent with its admission that the rent is payable in respect of the tenement mentioned in the avowry.)

At all events, the second plea in bar amounts to *non tenuit*.

(ALDERSON, B. : Suppose the rent was payable once in twenty years ?)

A rule having been granted, at the present sittings, (Feb. 10),

Tyrwhitt showed cause for the avowant :

It is clear that this was a "rent" within sect. 2 of 3 & 4 Will. IV. c. 27, being an ancient rent-service charged on the land, for which an assise would lie: *Paget v. Foley* (1), *Grant v. Ellis* (2). There are, then, two points : first, whether the stat. 3 & 4 Will. IV. c. 27, operated as a bar to the defendant's distress ; secondly, if it did, whether it should have been pleaded specially. On the first point ; the statute did not operate as a bar. It will be contended that, as the last payment of rent took place on 15th January, 1825, when the arrear due at Michaelmas, 1824, was paid off, the distress made on 18th May, 1845, for six years' rent due at Michaelmas, 1844, was made more than twenty years after the right to make a distress accrued, viz. after the "last time" at which the rent was "received," those being the terms of sect. 3. It will thus be sought, not to read sect. 3 as ancillary to sect. 2, in cases not absolutely provided for by it, but to make sect. 3 override the second section. If that is so, the defendant's "right to make a distress," for the freehold rent must have accrued at some time before the rent due at Michaelmas, 1825, had become due, though his first right to distrain could have only then arisen. That argument would enure to the disinherison of the owner of the rent, and to a Parliamentary conveyance of it to the tenant, under sect. 34. But,

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(1) 42 R. R. 698 (2 Bing. N. C. 679).

(2) 60 R. R. 694 (9 M. & W. 113).

(3) See *Latch*. 264 ; *Bac. Ab.*,
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was due till that day. To make the distress of 13th May, 1845, out of time for more than twenty years after the right to make distress "first accrued," the plaintiff must say that that right "first accrued," before 13th May, 1825; but the rent then in course of accruing due, for the first of the twenty years, reckoned from Michaelmas, 1824, could not be distrained for till the Michaelmas of 1825. On sect. 2 standing alone, this case is clear in favour of the avowant; the difficulty is set up on sect. 3, which is read as controlling *the plain enactment of sect. 2. On the relation of these two sections to each other, TINDAL, Ch.J., makes the following observations, in delivering the judgment of the Court of Common Pleas in *James v. Salter* (1). "That this case must have been governed by the 2nd section, had that section stood alone, cannot be doubted; and on a more close examination of the 3rd section, the object and intent of it seem to us to be no more than this—to explain and give a construction to the enactment contained in the second clause, as to 'the time at which the right to make a distress for any rent shall be deemed to have first accrued' in those cases only in which doubt or difficulty might occur, leaving every case which plainly falls within the general words of the 2nd section, but is not included among the instances given by the 3rd, to be governed by the operation of the 2nd." He adds, "Many reasons concur to show that such must be the just construction of the Act. In the first place, if it had been intended that the 3rd section should limit the application of the second to those cases, and those only, which are enumerated in the third, it might justly have been expected that words would have been employed to express clearly *and distinctly such an intention. But in this section there are no words that can be said directly to exclude all instances, except those enumerated in the 3rd section." In a latter part of the judgment the CHIEF JUSTICE distinctly says, "the claim and title of the defendant to the annuity is barred by the lapse of twenty years since his right to

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(1) 43 R. R. 741 (3 Bing. N. C. 544, 553, 555). Distress in 1835, for 870*l.*, part of and arrears of the annuity of 30*l.* (for above twenty-five years), beginning to accrue at testator's death, April, 1805. No distress was made for twenty-nine years after the right to distrain first accrued, and that fact appeared on the record (see per TINDAL, Ch. J., 43 R. R. p. 744): and

there was a plea in bar, that it was not made within six years after the said arrears in respect of said annuity became due; but the defendant was held entitled to judgment, because the question only respected the amount of arrears, and not the title to the annuity, and the distress was in time for the last six years. (Per CUR., 43 R. R. 747.)

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distrain 'first accrued.'” In *Grant v. Ellis* (1), this Court says: “In the 3rd and some other sections, the Act proceeds to define the time in most, though (as is noticed by TINDAL, Ch. J., in *James v. Salter*), not in all, possible cases at which the right to make a distress for the purpose of recovering any rent shall be deemed to have ‘first accrued’ to the party making the same.”

It is contended, that where the meaning of a section is clear, a Court is not at liberty to create doubts by referring to other sections. Now sect. 2 contemplates the case where the right or title to the rent itself is disputed; but if sect. 3 has operation in this case, the defendant could not have “discontinued” receipt of this rent before his right to its possession accrued at Michaelmas, 1825, viz. before, in the words of sect. 3, he was “entitled thereto.”

(PARKE, B.: Those words only apply to the estate in the rent.)

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The avowant did not “discontinue” its receipt till it fell first in arrear at that date. If the defendant “discontinued” its receipt at the last payment of it in January, 1825, then, though no one else has received it since adversely to him, the not distraining for it before it was due, viz. 13th May, 1825, will, under sect. 34, extinguish the avowant’s estate in it, and transfer it to the tenant. To be “dispossessed” of a rent, some one must have successfully disputed your title, and the rent must have been received by another by paramount title, or withheld by hostile resolution of the rent-payer. The word “dispossession” *in sect. 3 may more properly apply to “land,” but is the key to the meaning of “discontinuance” of receipt of rent; for it means hostile dispossession, and is quite different from mere omission to receive. To bring this case within sect. 3, the defendant must have voluntarily discontinued the receipt of the rent, or, as observed by ALDERSON, B., in *Doe d. Davy v. Oxenham* (2), “a party might lose his estate by having an insolvent tenant,” or, as might be added, by indulgence, or reluctance to enforce a small right by distress, though constantly, as in this case, applied for during the twenty years. Another absurdity results from the argument on the other side. If sect. 3 overrides sect. 2 in this particular, so as to make the statute begin to run from Michaelmas, 1824, the rent was lost and barred at Michaelmas, 1844, viz. in nineteen years after the first payment of it which fell

(1) 60 B. R. 694 (9 M. & W. 113) (2) 56 B. R. 662 (7 M. & W. 131). and 124).

in arrear, viz. at Michaelmas, 1825, could be enforced by distress or action. But if the plaintiff only contends that the twenty years count from the "last time" the rent was in fact "received," then, if it was not paid till a year or ten years after due, it would follow that the twenty years would begin to run from the time, whatever it might be, of the rent being "received" in point of fact, which would make the operation of the rule depend in every case on an uncertain event, and the time of limitation, instead of depending on the day when the rent which was paid became due, might be indefinitely extended. Nothing is provided by sect. 34 as to extinguishing any arrear of a freehold rent (1). Then what is to become of the twentieth year's rent, where the last previous payment of rent was at a date more than twenty years before the end of the twentieth year, before which *time the rent of that year was not due? For if the argument on the other side is to prevail, as no payment had been made within those twenty years, the twentieth year's rent would no sooner be due than it would be extinguished by sect. 34. But an adherence to the clear words of sect. 2 prevents that absurdity. Copses of underwood, grown for hop-poles, might well be held at an ancient freehold rent, payable in the year of cutting them, be that the tenth or twentieth year of their growth. Again, supposing nineteen years' rent not paid till five years after the lapse of the twentieth year from the previous payment—is the statute to run from the end of the five years, that being "the last time at which the rent was received" in fact? If it is, the time of limitation will be indefinitely extended, instead of remaining capable of being accurately fixed by the day on which the right to the rent and the remedy for recovering it first accrued.

Secondly, if the Statute of Limitations, 3 & 4 Will. IV. c. 27, constitutes a defence in this case, it should have been pleaded specially in bar, and cannot be taken advantage of on *non tenuit*.

* * So far as the course of pleading since 3 & 4 Will. IV. c. 27, has weight, it has been always considered right to plead that statute in bar in replevin, by analogy to the old law: *James v. Salter* (2); *Grant v. Ellis* (3). So, it has been replied specially in trespass, to a plea of entry by the defendant: *Holmes v. Newland* (4).

(PARKE, B.: In *James v. Salter* it had become necessary to plead

(1) Sect. 42 seems to provide for arrears of rent reserved by demise; see 60 R. R. 698 (9 M. & W. 118), *arguendo*.

(2) 43 R. R. 741 (3 Bing. N. C. 554).

(3) 60 R. R. 694 (9 M. & W. 113).

(4) 11 Ad. & El. 44.

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specially in bar, as the avowry set out a will and relied on it. The plaintiff's counsel need not answer this point.)

Whateley and Carrington, contra :

No case has yet occurred which is exactly in point; but it is clear that sections 2 and 3 are to be read together.

(ALDERSON, B. : Their terms differ in some degree. There is no difficulty in construing sect. 2 adversely to you; but there certainly is a difficulty arising on sect. 3, though it is not easy to see that the defendant, by having omitted to bring an action, or make a distress, for more than twenty years, has been dispossessed, or discontinued his receipt of the rent.)

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The plaintiff contends, upon sect. 3, that the defendant discontinued *the receipt of this rent from the time at which it was last received, viz. 13th January, 1825, so as to make the distress in May, 1845, too late. That section is not a mere interpretation clause, but governs sect. 2, and decides this case. The case of *Lessee, Mannon v. Bingham* (1) is strongly in point for the plaintiff. It is thus stated in Mr. Shelford's "Real Property Statutes," 4th edit., p. 140: "In a recent case in Ireland, of a lease for lives, at a rent above 20s. (see sect. 9), with the common condition of re-entry, it was held, that the landlord could not maintain ejectment for non-payment of rent after the tenant had been more than twenty years in possession without paying rent to the landlord or any other person, a right of entry having accrued more than twenty years before. The case of *Doe d. Dary v. Oxenham* (2) was cited, and the Court was strongly pressed with the anomaly of the landlord's being entitled to recover the possession at the end of the term, or within twenty years after, and yet being unable to avail himself of the condition of re-entry in the subsisting lease. The Court, however, after much deliberation, while they recognised the propriety of the above decision of the English Exchequer, and admitted the existence of the anomaly, yet stated that they felt bound by the language of the enactments, which they thought clear on the subject." As to rents payable every twentieth year, no such cases are known in practice.

(ALDERSON, B. : An old forfeiture of twenty years' standing would

(1) Trin. 1841, C. B., Ireland; in Ireland, 676.
Smythe's Law of Landlord and Tenant

(2) 56 R. R. 662 (7 M. & W. 131).

be within the Act. The forfeiture in question sprung, originally, out of the non-payment of rent; but whether it had arisen more than twenty years before does not appear.)

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The case cited shows that the Irish Court of Common Pleas must have held the rent to be extinguished.

(ALDERSON, B.: They in fact controverted *Doe d. Davy v. Oxenham*, *though they are reported to have stated otherwise. What becomes of the last, or twentieth, year's rent ?) [*561]

Grant v. Ellis and *Doe v. Oxenham* both turned on the meaning of the word "rent."

(PARKE, B.: You say that the defendant "discontinued" the receipt, and, if so, that the statute is to run from the last time of any actual payment. That construction, if it clears the question of grammatical embarrassments, introduces all those of another kind.

ROLFE, B.: Had the owner of the rent died between Michaelmas, 1824, and Michaelmas, 1825, you would have stated him, in pleading, as having been in receipt of the rent when he died; for he had received the rent due at Michaelmas, 1824. Suppose he died after Michaelmas, 1825, no other person but his heir could have the rent. Your argument excludes all the savings for disabilities; so that, supposing the owner to have been a *feme sole* on the day the last payment was made, and to have married, or become lunatic, the rent would be equally extinguished, either at Michaelmas, 1844, or on the 15th of January, 1845, whether she was guilty of any *laches* or not.

PARKE, B.: If the Statute of Limitations once began to run, it would continue to do so, notwithstanding an intervening disability (1), which may be an answer to that difficulty.

ROLFE, B.: Your calculation of the period at which the statute begins to run, from Michaelmas, 1825, throws out of the case all the enactments in sect. 16, respecting disabilities, an inconvenience which does not arise if the statute is held to begin to run from Michaelmas, 1824.

(1) See *Doe d. Duroure v. Jones*, 2 R. R. 390 (4 T. R. 311); 1st Sel. N. P. 145; 2nd vol. 733, 10th ed.).

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ALDERSON, B. : If we take the literal and plain construction of sect. 2, we shall escape from the difficulties in which sect. 3 would plunge the case with reference to the savings for disabilities. By sect. 8, the right of the person entitled to make entry or distress is to be deemed to have first accrued at the determination of the first of such years, or other periods, or at the last time when any *rent payable in respect of such tenancy shall have been received, which shall first happen.)

That is in the plaintiff's favour, for no such words are found in sect. 8. The rule of acting on modern statutes is, to adhere to their words as far as possible. As to the meaning of *discontinuance* to receive rent, it is the reverse of continuing to do so. If the owner does discontinue receipt of rent, the last time he receives it is the time of discontinuance from which the statute runs.

(ALDERSON, B. : The right to distrain, by sect. 3, first accrues at the time of dispossession, (as it seems, of the land), or at the last time at which any such rent was received. We must try to make sense of these enactments, and to give effect to the spirit of them, as far as their words will admit.)

Banks v. Angel (1) was also mentioned.

Cur. adv. vult.

In Easter Term (April 20) the judgment of the COURT was delivered by

PARKE, B. :

The question in this case turns entirely on the construction to be put on the 2nd and 3rd sections of the Real Property Limitation Act, 3 & 4 Will. IV. c. 27.

The facts of the case are very short. The defendant was entitled to an ancient quit rent, payable annually at Michaelmas, out of certain land held of his manor. All the rent which accrued due up to Michaelmas, 1824, was duly paid, the last payment having been made on the 15th of January, 1825. No rent was paid after that date, and on the 15th of May, 1845, the defendant distrained for six years' arrears of rent accrued due up to Michaelmas, 1844; and the question is, whether, at the time of the distress, his title to this rent had been extinguished by lapse of time.

The Court has already given its opinion, that, if it was, the pleadings are proper.

The second section of the Act, so far as it applies to the *present case, enacts, that no person shall make an entry or distress, or bring any action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same. In this case, as all rent was paid up to Michaelmas, 1824, no distress could have been made prior to Michaelmas, 1825. Therefore, if the question depended entirely on this 2nd section, the distress made in May, 1845, i.e., within twenty years from Michaelmas, 1825, would seem to have been made in due time. But the question does not turn exclusively on this section; for, in the 3rd section, the Legislature, apparently considering that difficulties might exist as to the exact point of time from whence the twenty years should begin to date, has proceeded to fix that point in many, if not in all, possible cases. The language of the third clause, so far as it is applicable to this case, is as follows: "And be it further enacted, that, in the construction of this Act, the right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter mentioned, that is to say, when the person claiming such land or rent shall have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession, or discontinuance of possession, or at the last time at which any such profits or rent were or was so received." Here the defendant was, up to 1826, in receipt of the rent in question, and afterwards discontinued such receipt; so that he comes precisely within the description of the persons referred to in the first branch of the statute; and the question is, whether, in such a case, the statute meant absolutely to fix the point from which the twenty years are to date, at the day on which the last payment of rent was *made, or to enable the party claiming to calculate from that date, or, at his option, from the time when he discontinued the receipt of the rents. We think the former is the true construction, and that, in the case of rent, the calculation must always be made from the last actual receipt. Although the clause in this branch of it seems to present an alternative, viz. either the discontinuance of possession

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or the last actual receipt; yet we think that, in truth, no alternative is contemplated.

The statute, it will be observed, provides, in the same sentence, both for the case of land of which a party has been dispossessed, and for that of rent which he has ceased to receive; and the sentence must be read, not as giving in either case a choice, but *reddendo singula singulis*, i.e., fixing the actual moment of dispossession, or discontinuance of possession, as the point from which the twenty years are to run, in the case of land of which a party has, at some moment of time, ceased to be in actual possession, and the last actual payment of rent, as the point from which the twenty years are to run in the case of a party ceasing to receive rent. The object of the Legislature seems to have been to fix a point, the exact position of which should be perfectly clear, rather than one which should, abstractedly considered, be the most just.

The last payment, in the case of rent, is a point of time which could admit of no doubt; whereas the time at which a party has discontinued the receipt of rent is obviously a point of time very difficult to ascertain. When does a party entitled to rent "discontinue" its receipt? Does he do so by not receiving it on the day on which it is due? Or, if not, how soon afterwards? There would be very great difficulty in fixing any such point. Add to which, the expression, in this part of the clause, is not discontinuance of receipt, but discontinuance of possession; language which appears to us to apply to the case not of rent but of land.

[*565] It must not, however, be overlooked, that there are difficulties *in this construction. In the first place, the twenty years are thus made to comprise a space of time during which the party could not have instituted any proceedings, and during which, therefore, he is guilty of no *laches* in not instituting legal proceedings. The general principle of the Statutes of Limitations has been to fix the period during which a party having a right to institute legal proceedings may exercise that right, and that principle, in the clause now under consideration, is fully adhered to in the case of land. A person dispossessed of land is allowed twenty years from the time of his being dispossessed, and during all that period he may bring his ejectment. But a person disseised of rent has (according to the construction we adopt) only twenty years from the last payment; and so if an annual rent has been paid on the day on which it is due, and afterwards unjustly withheld, the

party aggrieved has only nineteen years instead of twenty, during which he can bring his action or distrain; for during the first year of the twenty it is plain that he has no right of distress or action at all. This is undoubtedly an anomaly, but it must still exist in many cases, whatever construction we put on the branch of the third section now under consideration; for the second branch of the same section provides for the case of a party dying seised of a rent, and enacts that in such case the right of the heir or devisee to make a distress, or bring an action, shall be deemed to have first occurred at the time of the death of the party dying; and it is plain that the period of twenty years may thus include time during which no right of action or distress will have existed; and the same objection applies to the other branches of the third section, which provide for the cases of parties claiming by purchase, parties claiming reversionary interests, and persons claiming under breaches of condition. It applies also to the very common case of tenancies from year to year, provided for by the eighth section, where the end of the first year of the tenancy, or the last *payment of rent, is declared to be the time when the right first accrues; and yet there is not necessarily any right to enter at either period.

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Another difficulty was pointed out and much insisted on at the Bar, namely, that, on the construction which we adopt, great injustice would necessarily result in the ordinary case of heriots and other similar rights, which become due at uncertain intervals; and also the possible, though not very probable case of a rent reserved payable every twenty years, or at a longer interval. In such cases, if the twenty years are to be calculated from the last payment, a party, it was argued, will lose his right without any default or *laches* whatever, when the rent is payable at intervals greater than twenty years, and it is shortened to less than a year where it is payable every twenty years; and no doubt great difficulty may exist in dealing with such cases. But as to heriots, probably the answer to this objection may be, that in a case similar to that now before us, the word "rent" would not include heriots—for though by the interpretation clause the word "rent" is made to include heriots, yet that is only where the nature of the provision or the context does not exclude such a construction; and it may be that the injustice pointed out would afford grounds for holding that in the clause now under consideration the word "rent" does not include heriots. A similar observation may be

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made upon the case of rents payable at greater intervals than twenty years, and this may be considered either as falling under the general enactment in the second section, so that each particular heriot or amount of rent due may be recovered within twenty years, or is not provided for by the statute at all, and is left in the same condition as if the Act had not passed.

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The same answer certainly cannot be given to the case of rents reserved payable at intervals of twenty years, or less, in which the time, upon our construction, must be much shortened. It may, however, be very doubtful, whether in *fact any rents payable at such large intervals do exist, and even if there are any such, we do not think the argument derived from their existence can affect the question, considering that, whatever interpretation we put on the first branch of the section, it is quite certain that, in all the other branches of it, the anomalies and difficulties pointed out must exist.

The last objection insisted on was founded on the 16th section, which saves the rights of infants, *femes covert*, lunatics, and other persons under disabilities. The clause, it will be observed, is made to operate only where the party intended to be protected is under disability at the time when the right to make the distress or bring the action first accrued; and if this be held to be the time when the last payment was made, the protection will, in many cases, be wholly illusory. Put the case, for instance, of a party regularly receiving his rent up to a given day, and becoming lunatic before the next day of payment arrives; if he should, by reason of his lunacy, omit to enforce payment of his rent for twenty years, it would seem, on all principle, that he must have been intended to be protected; but, certainly, as he was not under disability at the last time of payment, he would not come within the protection of the 16th section. Many other similar cases may be pointed out. This is, no doubt, a very serious defect, and would afford strong grounds for adopting any reasonable construction of the third section by which it might be remedied. But no construction would have that result; for, even if by a forced and difficult construction of the sixth branch of the section, we were to hold that the point of time there designated was not the last actual payment, but the time when the rent first fell into arrear; yet the very same difficulty would exist in all the other cases pointed out by the statute, namely, the case of a person dying seised and leaving an heir not under *disabilities, but who should become disabled before any rent has accrued due, and the case of a person claiming under

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a settlement, who may be a *feme sole* when her title accrues, but may be under coverture before she has any title to distrain or sue for rent; and so as to the other cases provided for by the third section. The same thing may be said of the eighth section. For these reasons, though we are fully sensible of the incongruities of the case, yet we feel bound to act on the plain and natural construction of the language of the third section, and to hold that the right of the defendant in this case to distrain must be taken to have first accrued on the 15th day of January, 1825, when the last payment was made, and so that the distress made in May, 1845, was unlawful, all right to the rent having been extinguished before that time. The rule must therefore be made absolute.

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(It being stated for the defendant, that, as the learned Judge at the trial was of opinion in favour of the defendant, he had had no opportunity of tendering a bill of exceptions, so that, as he could not distrain again, he would be altogether concluded by the above judgment from carrying the question into a court of error, the Court inclined to grant a new trial on payment of costs, but intimated that the best course would be for both parties to consent to a special verdict, which was afterwards agreed to on terms.)

IN THE EXCHEQUER CHAMBER.

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(5 Ex. 166—182; S. C. 19 L. J. Ex. 177.)

1849.
Feb. 5.
1850.
Feb. 7.

A defendant in replevin avowed the taking of the goods for arrears of an ancient quit-rent issuing out of a tenement held of him as lord of a certain manor by fealty and 9s. rent. The plaintiff pleaded (*inter alia*) *non tenuit*. The last payment was made on the 25th of January, 1825, for rent due on the 11th of October, 1824. The distress was made on the 13th of May, 1845: Held, (on error in the Exchequer Chamber, affirming the judgment of the Court of Exchequer), that, by the operation of the 2 & 3 Will. IV. c. 27, ss. 2, 3, and 34 (2), the rent was extinguished by the lapse of twenty years from the day on which the last payment was made; and that the limitation need not be pleaded specially, but was available under the plea of *non tenuit*.

[5 Ex. 166]

In this case, a special verdict having been agreed to (3), and judgment entered up, the defendant below brought a writ of error thereon.

(1) See *Lord Zouche v. Dalbiac* (1875) L. R. 10 Ex. 172, 44 L. J. Ex. 109, and other cases cited, p. 612, above.—J. G. P.

(2) See now 37 & 38 Vict. c. 57, s. 1.

(3) See *Owen v. De Beauvoir*, *supra*, p. 612 (16 M. & W. 547).

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The declaration was in replevin, for a cart distrained in a certain barn, in the parish of West Ilsley, in the county of Berkshire.

[The avowry and pleas in bar are set out in the report of *Owen v. De Beauvoir*, *supra*, pp. 613, 614.]

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The special verdict stated the following facts: That long before and on the 13th of May, 1845, the barn in the declaration mentioned was parcel of a certain tenement called Hodcott Farm, with the appurtenances, situate and being in the county of Berkshire; and that the same tenement was before and on the 11th of October, 1824, holden of the manor of Stratfield Mortimer within the said county, by fealty and the rent of 9s. yearly, to be paid at the Feast-day of St. Michael in every year, according to the Old Style and computation of time formerly used in this kingdom. The barn in the declaration mentioned was parcel of the same tenement during all the time last aforesaid, and holden of the said manor, by reason of being such parcel as aforesaid, during all the time last aforesaid, and the *said barn continued to be and was parcel of the same tenement and holden of the same manor as aforesaid, on and from the said 11th of October, 1824, until and on the 13th of May, 1845, and thence afterwards; unless by reason of no rent having been paid subsequent to the payment of 3*l.* 12*s.* hereinafter mentioned, and of the statute 3 & 4 Will. IV. c. 27, the said barn ceased to be so holden as aforesaid. On the 15th of January, 1825, the sum of 3*l.* 12*s.* was paid by Edward Tull, the then possessor and occupier of the said tenement, to the defendant, as and for the arrears of quit-rent due up to the 11th of October, being the Feast-day of St. Michael, according to the Old Style and computation of time formerly used in this kingdom, in the year of our Lord 1824, in respect of the said tenement, to the defendant as lord of the said manor. The defendant, before and at the time last aforesaid, and at the time of the making of the distress, was the lord and owner and possessed of the said manor; by reason of which payment, all arrears of the said rent due in respect of the said tenement up to the said 11th of October, 1824, were fully paid and satisfied; and nothing was paid in respect of any part of the said rent after the said 15th of January, 1825; and on the 13th of May, 1845, the defendant, then being such owner and possessed of the said manor as aforesaid, took the said carts, goods, and chattels in the declaration mentioned, in the said barn, as a distress for six years' arrear of the said rent alleged to have accrued due to him on and up to the 11th of October, 1844, being the Feast-day of St. Michael,

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according to the Old Style and computation of time formerly used in this kingdom. The said barn in which &c., was parcel of the said tenement called Hodcott Farm, in manner and form as in the avowry alleged, and the defendant was the owner, and possessed of the said manor, in manner and form as in the avowry alleged.

Errors having been assigned thereon, the case was argued, February 5, 1849 (1), by

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Cowling, for the plaintiff in error :

The first question is, whether the period of twenty years, mentioned in the 3 & 4 Will. IV. c. 27, commenced running from the time of the last payment of rent, viz. the 15th of January, 1835, or from the time when the first arrear of rent accrued due, viz. on the 11th of October, 1825. That depends upon the construction of the 2nd and 3rd sections of the 3 & 4 Will. IV. c. 27. That Act does not profess to repeal any former *statute, or to introduce a new system, but only modifies the prior law. In order, therefore, to understand its provisions, *it is necessary to refer to the 21 Jac. I. c. 16, s. 1. The earliest case which arose on that statute is *Reading v. Royston* (2), where it was construed to mean that the entry must be within twenty years after the claimant is actually disseised or ousted. Such has been considered the true construction from that period up to the time of the passing of the 3 & 4 Will. IV. Therefore, in order to bar the claimant, he must not only have been out of possession and another in, but the possession of that other must have been adverse. The language of the 21 Jac. I. c. 16, s. 1, is substantially the same as that of the 3 & 4 Will. IV. c. 27, s. 2, the latter statute merely extending to the case of rent, the provisions of the former as to lands. If, then, the 2nd section of the latter Act had stood alone, the same construction must have been put upon it as on the former Act, and the same ingredients would have been requisite to bar the claimant. But the 3rd section shows that some alteration was intended to be introduced; and it is submitted that the intention was not to do away with *adverse possession, but with the difficulty of proving whether the possession was adverse or not. That such was the remedy intended is clear from a passage in the "First Report of the Commissioners on the Law of Real Property," p. 47, where it is said, "Great practical difficulty has arisen in determining what is adverse possession, and

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(1) Before Patteson, J., Coleridge, Williams, J.
J., Coltman, J., Maule, J., Cresswell, (2) 2 Salk. 423.
J., Erle, J., Wightman, J., and

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when it shall have been considered to have begun. This must generally be left as a question of fact for a jury; but there are some rules of law, *præsumptiones juris et de jure*, which absolutely prevent the possession from being considered adverse, and the expediency of which is very questionable, as they do not seem necessary for preserving rightful claims, and they greatly impair the healing tendency of the Statute of Limitations." To obviate that difficulty, the 3rd section of the 3 & 4 Will. IV. c. 27, renders the mere circumstance of the claimant being out of possession and another in, evidence of adverse possession, unless the legal presumption is rebutted in some of the modes pointed out by the statute. So that it is not enough to bar the claimant, that he is out of possession for a prescribed period, but another must be in. In this case no person could be in possession until the 11th October, 1825, therefore the statute would not run until after that time. That the statute was never intended to do away with adverse possession also appears from the following passage in the Report of the same Commissioners, p. 40: "We propose that the law should be rendered simple and consistent—by giving a uniform and certain effect to adverse enjoyment—by giving all persons alleging that they are unjustly deprived of their estates the same time for enforcing their claims, with a certain indulgence to claimants under disabilities—and by giving one remedy at law with regard to lands instead of the existing variety of remedies to which the different periods of limitation are attached." So far from doing away with adverse possession, *the statute treats the mere continuance of another party in possession as adverse. It was observed by PATTESON, J., in *Doe d. Jones v. Williams* (1), that, "from the language of the 15th section, it plainly appears that something or other was, after the Act passed, to be considered as adverse possession, which was not so before the Act passed; for in that section it seemed to be considered that the possession, which, up to the passing of the Act, was not adverse as the law then stood, would, by the operation of the Act, become so on the very day after the Act passed, and that by relation; otherwise the provision as to the five years was not needed to protect the right of the party against whom such adverse possession might be set up." The 14th section, which renders an acknowledgment in writing given to the person entitled, or his agent, equivalent to possession or receipt of rent, also supports the construction contended for.

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(1) 44 R. R. 421 (5 Ad. & El. 296).

(PATTESON, J.: That section goes further; it says that "such possession or receipt, of or by the person by whom such acknowledgment shall have been given, shall be deemed to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given.")

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The effect of the 2nd and 3rd sections of the statute is to bar the claimant, where twenty years have elapsed since his right accrued, whatever be the nature of the possession, except in cases falling within the 15th section: *Nepean v. Doe d. Knight* (1). But there must be some possession to affect the interest, for the statute will not run until it is possible to be dispossessed of what is claimed. The former part of the 3rd section applies to persons entitled to estates in possession, whether in fee or otherwise, the latter to those entitled in reversion or remainder. That section was not intended to explain, in every instance, the enactment contained in the 2nd section as to "the time at which the right to make a distress for any rent shall be deemed to have first accrued," but those cases only in which doubt or difficulty might occur: *James v. Salter* (2); as, for instance, whether the possession was to be considered as adverse, and when the adverse possession was to begin. As respects "land," the meaning of the section is clear, viz. that where the person in actual occupation, or in virtual occupation by receipt of the profits (and a person who lets from year to year is considered as such, sect. 35), shall be dispossessed or discontinue such possession or receipt, the period of limitation shall run from such dispossession or discontinuance, unless in either case there appears to have been a subsequent receipt of "any such profits;" that is, unless proof can be given of the receipt of any portion of the profits, in which case the time is not to run till such receipt; so that part payment has a similar effect to an acknowledgment in writing under the 1st sect. of the 9 Geo. IV. c. 14. The same construction ought to apply to the case of rent, otherwise there would be this incongruity, that the right to bring an action or make a distress would accrue before the rent was due. And, further, a person who came under disability between the time when the right to bring an action or make a distress is to be deemed to have first accrued, and when it did actually accrue, could not avail himself of the provisions of the 16th section. The

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(1) 46 R. R. 789 (2 M. & W. 894).

(2) 43 R. R. 741 (3 Bing. N. C. 544; S. C. 4 Scott, 168).

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phrase "while entitled thereto," means while entitled to the possession of the land or receipt of the profits; and, in this case, the plaintiff in error could not be entitled to the rent until the 11th of October, 1825. If the plaintiff in error had claimed as heir to his father, who had received the rent in January, 1825, and had died after the 13th of May, he would have had twenty years *from his father's death before his right was barred. So also, if the rent had been conveyed to the plaintiff in error by any instrument, except a will, at any time after January, 1825: Sugd. Vend. & Pur. 617, 11th ed. If the words "or at the last time at which any such profits or rent were or was so received" be read literally, and as applicable to a virtual possession, it would follow that, in the case of a long lease, the lessor would be barred by the non-receipt of rent for twenty years, although the lease was running, which is inconsistent with the decision in *Grant v. Ellis* (1). But the 7th, 8th, and 9th sections show that the right is not, in all cases of virtual possession, to be deemed to accrue on the last payment. Therefore, in order to make those sections consistent with the 3rd, the latter must be construed as meaning that the discontinuance of the receipt of the profits shall commence only from the time when the rent was payable. (He also referred to *Owen v. De Beauvoir* (2).)

Then with respect to the other point. The fourth plea admits that the defendant in error held the premises of the plaintiff at the rent in the avowry alleged, and the only issue raised is, whether that rent was in arrear. He was, therefore, not entitled to show that the right to recover the rent was barred by the statute.

Carrington, for the defendant in error :

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The 3 & 4 Will. IV. c. 27, cannot be explained by the 21 Jac. I. c. 16; for, as Lord Chancellor SUGDEN observed, in *The Incorporated Society v. Richards* (3), "There is a marked distinction between the old Statutes of Limitation and the present one. The former statutes only bar the remedy, but did not touch the right—possession at all times gave a certain right; but, under the new Act, where the remedy is barred, the right and title of the real owner are extinguished, *and are, in effect, transferred to the person whose possession is a bar." The 3rd section includes this case. That and the 2nd section must be read together, as explaining one another. The right to make a distress is, by the terms of the

(1) 60 R. R. 694 (9 M. & W. 113).

(3) 58 R. R. 266 (1 Dr. & War. 289).

(2) *Supra*, p. 612.

3rd section, to be deemed to have first accrued, not from the time when the rent was payable, but from the time of its last receipt. Wherever the Legislature intended the statute to run from the last payment they have expressly said so, as in the 8th section. The words "disposition or discontinuance of possession," in sect. 3, do not apply to rent, which is provided for by the last branch of the section. (He then referred to the judgment of the Court in *Owen v. De Beauvoir* (1).)

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Cur. adv. vult.

The judgment of the Court was now delivered by

PATTESON, J.:

This was the case of a distress, made by the plaintiff in error, for arrears of an ancient quit-rent, issuing out of a tenement held of him as lord of the manor of Stratfield Mortimer, by fealty and 9s. rent. Such a rent is clearly within the 2nd, 3rd, and 34th sections of the statute 3 & 4 Will. IV. c. 27, and the question turns entirely upon the construction to be put upon those sections. The last payment was made on the 25th of January, 1825, for rent due on the 11th of October, 1824. The distress, in respect of which this action is brought, was made on the 13th of May, 1845. If the twenty years mentioned in the 2nd and 3rd sections had then expired, the right and title of the plaintiff in error to the rent had become extinguished by sect. 34, and the tenement was no longer held of the manor by the rent of 9s. per annum. The question was therefore properly raised on the issue of *non tenuit*, without pleading the lapse of twenty years specially, notwithstanding *the saving for disabilities in sect. 16. The necessity to plead a Statute of Limitations applies to cases where the remedy only is taken away, and in which the defence is by way of confession and avoidance; not where the right and title to the thing is extinguished and gone, and the defence is by denial of that right.

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With respect to the argument, that the case falls within the reason which has been sometimes given for requiring the Statute of Limitations to be pleaded; that is, that the exceptions in favour of persons under disability might not be rendered useless, and they taken by surprise at the trial, by finding the Statute of Limitations then first relied on, it is to be observed, that the true reason for requiring the statute to be pleaded is, that it confesses and avoids

(1) *Supra*, p. 622.

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the declaration, and therefore is not comprehended within any plea, which merely denies the whole or part of the declaration : *Gale v. Capern* (1), *Margetts v. Bays* (2). The general rule, that matter in confession and avoidance could not be given in evidence under a plea merely negative, was subject to an exception, real or apparent, in actions of assumpsit, in which many matters, which might have been pleaded in confession and avoidance, were, before the New Rules, allowed to be shown under the general issue ; and probably the reason for requiring the Statute of Limitations to be pleaded in assumpsit, and not allowing it to be comprehended among those matters in confession and avoidance, which might be shown under the general issue, may have been the inconvenience suggested in this argument. But in the present case, the defence is not that the cause of action did indeed accrue, but not within the time of limitation, but that the tenure alleged in the avowry was extinguished and put an end to before the time of the distress.

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Great difficulties undoubtedly present themselves to our *minds in endeavouring to ascertain the meaning of the Legislature in sects. 2 and 3 ; and those difficulties have been pressed upon us by the learned counsel with great force and ability, and we feel that it is impossible by any construction to avoid some apparent incongruity : but upon the best consideration which we can give to the case, we are compelled, by the express words of the 3rd section, to hold, that the construction put upon them by the Court below is correct.

The plaintiff in error was himself the person who received the last rent, and who remained entitled thereto. Taking such of the words of the 2nd and 3rd sections as are applicable to this case, we find it enacted, “ that no person shall make a distress to recover any rent, but within twenty years next after the time at which the right to make such distress shall have first accrued to the person making the same ; that the right to make such distress shall be deemed to have first accrued at such time as thereafter mentioned ; that is to say, when the person claiming such rent shall have been in receipt of such rent, and shall, while entitled thereto, have discontinued such receipt, then such right shall be deemed to have first accrued at the last time at which such rent was so received.” In this case, that last time was on the 25th of January, 1825, more than twenty years before the distress in question was made. It is obvious, that, as the rent due 11th of October, 1824,

(1) 1 Ad. & El. 102.

(2) 4 Ad. & El. 489.

had been paid, and as no further rent was due till the 11th of October, 1825, the right to make a distress is, by the express words of the statute, deemed to have first accrued, and the twenty years therefore to have commenced many months before any rent which could be distrained for was due; and we are asked to put some construction upon the words, which shall avoid this apparent absurdity.

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We cannot derive any assistance from the other words of the section, "at the time of such dispossession or discontinuance of possession;" for they are not applicable to *rent, but to land only; and, therefore, unless we give to the words "at the last time at which such rent was so received" their plain and direct meaning, we must read them as if they were "at the first time at which rent being due has not been received,"—a meaning of which the words as they stand in the statute are not capable. One of the arguments adduced to lead us to some such construction was, that, by adhering to the literal meaning of the words of the statute, we should be obliged to hold, that if a lease for fifty years rendering rent were made, and no rent received for twenty years, all right to rent for the remaining thirty years would be extinguished, and yet the right to have the land at the end of fifty years would remain. But that is not so; for these sections do not apply to leases on which a conventional rent is reserved, as was held by the Court of Exchequer, in *Grant v. Ellis* (1). But the two main objections to the construction adopted by the Court below are, first, that it requires the limitation of twenty years against a right of action or distress to begin, in the case of rent, from the time before the right to bring an action or to distrain had accrued, which it was urged was something so anomalous and unreasonable, that it raised a presumption against such being the real intention of the Act; and, secondly, that a person coming under disability between the time when the right of action, &c., is to be deemed to have first accrued, and the time when it actually did first accrue, would not be protected by the saving in sect. 16. It may be convenient, with a view to those objections, to consider what was the law respecting limitations of claims of real property, particularly of rents, before the passing of the Act in question. Those limitations depended on the stat. 32 Hen. VIII. c. 2, and 21 Jac. I. c. 16. The latter statute limited entries, and consequently ejectments, to twenty

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* years after the right and title of entry accrued, and limited *formedons* in descender, remainder, or reverter, to twenty years after the title and cause of action first descended or fallen. This statute had no application to distresses, or to any action for rent, except actions of *formedon*. Real actions in general, and distresses for rent, were limited, at the time of the passing of the 3 & 4 Will. IV. as far as they were subject to limitation by the 32 Hen. VIII., c. 2. The 1st, 2nd, and 3rd sections of this Act limited the time for bringing writs of right on the seisin of an ancestor to sixty years, possessory actions on the seisin of the ancestor to fifty years, and all actions on the seisin of the demandant to thirty years, respectively. Each of these terms began from the time of seisin of the ancestor or the demandant, not from the time of the first accruing of the action; and in the case of rent, the seisin to maintain such action must be actual seisin by receipt of rent (1); so that, under this statute, the limitation for real actions for the recovery of rents ran from the last receipt, not from the accruing of the cause of action. By sect. 4 of this Act of Hen. VIII., it is provided, "that no person shall make any avowry or cognisance for any rent, &c., and allege any seisin of any rent, &c., in the same avowry or cognisance, in the possession of his or their ancestor or predecessor, or in his own possession, or in the possession of any other whose estate he shall pretend or claim to have above fifty years next before the making of the said avowry or cognisance." And by sect. 6, if the avowrant, &c., could not prove the seisin within the time appointed, if the same seisin were traversed, he was barred. It was by these sections only that the time for making distresses for rent was limited, down to the time of the 3 & 4 Will. IV. c. 27. Upon these sections it was held, that they did not extend to a rent created by deed, or reserved on a gift in *tail*, as to which there was no term of limitation: *Sir W. Foster's* case (2). It was also determined, that these sections did not require seisin in fact, but would be satisfied by seisin in law, which, before the statute, was sufficient to enable the person so seised to distrain, though not to maintain an assize, for which seisin in fact by payment was necessary. But whether the seisin were one in fact, as by payment of rent, or in law, as by attornment, or by actual seisin of some other service than the rent, as fealty, &c., or by the acquisition of an estate which authorised a distress without attornment, as by

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1) Littleton, ss. 235, 465.

(2) 8 Co. Rep. 64 b.

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devise, &c., the time of limitation ran, not from the accruing of the right to distrain, but from the time of the seisin, in fact or in law, which time might be before the right to distrain accrued : *Beril's case* (1) ; Litt. ss. 565, 585 ; and see the stat. 4 Anne, c. 16, ss. 9 and 10. It may also be remarked, that, in appointing the seisin as the point at which limitation should begin, the statute of 32 Hen. VIII. followed the still older Statutes of Limitations ; the Statute of Merton, 20 Hen. III. c. 8, and that of Westminster 1st, 3 Edw. I. c. 39, fixing a limitation from the time of seisin in real actions, and that of Westminster 2nd, 13 Edw. I. stat. 1, c. 2, limiting the time for distresses for services in like manner. The present Act, therefore, in directing the limitation to run from a time before the right accrues, would not be adopting any new principle, but would be conformable to the law which prevailed from the time of Hen. III. till 3 Will. IV. The form, indeed, in which this intention is expressed, is somewhat strange and paradoxical, in directing a right of action to be deemed to have first accrued, when none has accrued at all ; but the words of the Act are certainly capable of this sense, which is, indeed, the most obvious one ; and a similar arbitrary use of language is not without example in recent *legislation ; and the substance and effect of the provision, in pointing out the time from which limitation is to run, is nothing more than might be expected, looking to the law as it had long existed, and at the precedents of legislation on the subject. There does not therefore seem to be, in this respect, such a contradiction between the probable intent of the Legislature and the construction of the words of the Act, adopted by the Court of Exchequer, as makes it necessary to have recourse to a forced construction to reconcile the words and the intent. The inconvenience of a person coming under disability after the receipt of rent, and before the right of action, &c. accrued, was strongly pressed, and is indeed more substantial ; but it is to be observed, that the Legislature, in passing this Act, has in a much more important instance left the rights of persons under disability unprotected, inasmuch as sect. 42, which bars the recovery of arrears after six years, has no proviso in favour of such persons. The circumstance, therefore, of their not being perfectly protected by the 16th section, does not afford a ground for presuming against a construction which involves that consequence.

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We do not think it necessary to review some other arguments

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and possible cases which were put at the Bar, nor to pursue the reasonings upon them, which will be found in the report of this case in 16 M. & W. 547 (1). We proceed upon the words of the 2nd and 3rd sections of the statute, which are plain, and to which we do not feel ourselves justified in giving any other meaning than that which was given to them by the Court below.

Judgment affirmed.

IN THE COURT OF EXCHEQUER.

1850.
April 26.

GOULD v. THE STAFFORDSHIRE POTTERIES
WATERWORKS COMPANY.

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(5 Ex. 214—226; S. C. 19 L. J. Ex. 281; 14 Jur. 528; 1 L. M. & P. 264;
6 Rail. Cas. 568.)

Under the 34th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, which provides that all the costs of arbitration on the amount of compensation to be given for lands required to be taken by a public Company are to be settled by the arbitrators, such costs need not be incorporated in the award, but may be ascertained at a subsequent time by the persons who made the award (2).

Such adjudication of the costs need not be within three months after the time of the reference.

The term "the arbitrators" in that section may mean either the arbitrators or umpire, according as the compensation shall have been determined by the arbitrators or umpire.

DEBT. The declaration, after reciting, that before the passing of the Act of Parliament whereby the defendants were incorporated, i.e. the Staffordshire Potteries Waterworks Act, 1847, to wit, on &c., the plaintiff was, and hitherto hath been and still is, seised of certain lands, situate, to wit, at &c., in the county of Stafford, distinguished as &c., in a certain plan and book of reference which, prior to the application for the said Act of incorporation, to wit, on &c., was and still is deposited in the office of the clerk of the peace for the said county of Stafford, and which said book of reference then and still contains the name of the plaintiff as owner of the said lands; and that the defendants, after the making of the said Act, to wit, on &c., by virtue of the authority thereof, determined upon taking a part of the said lands, and an easement over other parts of the said lands, for the purposes of the said undertaking; and thereupon, to wit, on &c., by virtue of the said Act and the

(1) *Supra*, p. 612.

(Taxation of Costs) Act, 1895 (58 Vict.

(2) See now the Lands Clauses c. 11).—J. G. P.

Lands Clauses Consolidation Act, 1845, incorporated therewith, by writing, &c., to wit, on &c., gave notice to the plaintiff that the defendants required to purchase and take for their purposes the said land particularly described in the said notice and on a plan thereto annexed, and the said easement, which was also therein particularly described; and that they were willing to treat with the plaintiff for the purchase of the same from him, and as to the compensation to be made to him for any damage that might be sustained by him by reason of the execution of certain works then about to be undertaken and done by them, by virtue of the said last-mentioned Act." The *declaration, after averring that the defendants were then duly authorised and empowered by the statute to purchase and take the land, &c., proceeded to recite, that whereas the defendants, &c., to wit, on &c., offered to the plaintiff a certain sum, to wit, the sum of 359*l.* 3*s.* 11½*d.*, for the purchase of the fee simple of the said land and the said easement, and for the damages to be sustained by the plaintiff by the execution of the said works and undertaking, and no further and greater sum was ever at any time offered by the defendants to the plaintiff for the purchase thereof, or for the said damages. And after reciting that no agreement was come to between the defendants and the plaintiff as to the amount of compensation to be paid by the defendants for the interest of the plaintiff in the said lands and the said easement, or for the damage to be sustained by him as aforesaid; and the compensation then claimed by him from the defendants then far exceeded the sum of 50*l.*, to wit, &c., and the plaintiff was then desirous of having the same settled by arbitration, under the Lands Clauses Consolidation Act; and thereupon the plaintiff, to wit, on the 26th of August, 1848, and before the defendants had issued any warrant to the plaintiff to summon a jury in respect of the said lands and easement, &c., signified such his desire by notice in writing to the defendants, &c.; and thereupon afterwards, to wit, on &c., the defendants, in pursuance of the statute, that is to say, by a notice signed by two of the directors of the said Company, to wit, &c., duly nominated and appointed one J. Leach, of &c., to be an arbitrator, to settle and determine, in conjunction with an arbitrator to be appointed by the plaintiff, the amount of purchase-money and compensation to be paid by the defendants for the purchase and taking the said part of the said lands and the said easement; and afterwards, on &c., the plaintiff, to wit, in pursuance of the said Lands Clauses Consolidation Act,

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by writing, &c., bearing date, &c., duly nominated and appointed one T. Heaton, of &c., to be one of the arbitrators, *on his the plaintiff's part, to settle and determine the amount of the said purchase-money and compensation, in conjunction with one J. Leach, the other arbitrator so appointed, &c., and which said appointments and nominations were then, to wit, on &c., duly delivered by the plaintiff and defendants respectively to their respective arbitrators, and thereby, by virtue of the said Lands Clauses Consolidation Act, became and were submissions to arbitration on their respective parts. The declaration, after stating that the arbitrators, before entering on the consideration of the matters referred to them, subscribed the declaration required by the said Act, and by writing under their hands, bearing date, to wit, &c., in due form of law, pursuant to the provisions of the said Act, before entering on the before-mentioned reference, duly nominated and appointed R. S. Ford to be the umpire, to decide on any such matters as to which they should differ, or which should be referred to the said umpire, under the provisions of the said Acts or either of them, proceeded: "And the plaintiff further saith, that the said J. Leach and T. Heaton, by writing under both their hands, twice, to wit, on the 29th of September and on the 23rd of October, in the year aforesaid respectively, duly enlarged the time for making their award, first, to the 23rd of October, 1848, and again, to the 20th of November, 1848, and, to wit, on the 1st of October, took upon themselves the burthen of the said reference, and heard and examined witnesses of both parties, but did not and could not agree, nor did they make any award concerning the premises, within the said extended time or times, or at any time whatsoever, but on the contrary thereof, by writing under their hands, bearing date, to wit, on the 15th of November, 1848, then submitted to him the said R. S. Ford, as such umpire as aforesaid, the matters of the said arbitration, and the said matters then referred devolved upon the said umpire, to be determined by him." (Then followed an averment that the umpire, before entering upon the consideration of the matters referred to him, duly made *and subscribed the declaration required by the Lands Clauses Consolidation Act, 1845.) "And the plaintiff in fact says, that afterwards, and within three calendar months after the expiration of the said enlarged time, and within three months after it devolved upon the said R. S. Ford to determine the said matters referred, to wit, on the 13th of February, 1849, he the said

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R. S. Ford took upon himself the burthen of the said umpirage, and having deliberately and at large heard, examined, and considered the allegations, witnesses, and evidences of both the said parties concerning the premises, within the said three months as aforesaid, to wit, on the day and year last aforesaid, made and published his award, umpirage, and final determination, in writing under his hand and seal, bearing date the day and year last aforesaid, between the said parties, of and concerning the premises, in manner and form following, that is to say." The declaration then stated the award, which found the amount of purchase-money to be paid by the defendants to the plaintiff to amount to the sum of 820*l.*; and then averred that "the said sum of 359*l.* 8*s.* 11½*d.*, hereinbefore mentioned, was and is a much smaller sum than the said sum so awarded to the plaintiff by the said R. S. Ford, whereof the said R. S. Ford afterwards, to wit, on the 23rd of June, 1849, had notice, and was then required by the plaintiff to settle and determine the costs to be paid by the defendants to him the plaintiff, under and by virtue of the said Lands Clauses Consolidation Act; and thereupon the said R. S. Ford, to wit, on the day and year last aforesaid, by an instrument in writing under his hand and seal, bearing date, to wit, the day and year last aforesaid, duly settled the costs of the plaintiff of the said arbitration, and thereby ascertained and settled the same to be, and they in fact were, the sum of 260*l.*, and did thereby direct the same to be paid by the defendants to the plaintiff; which said award and which said last-mentioned instrument in writing were afterwards, to wit, on the day and year last aforesaid, *duly delivered by the said umpire to the defendants, and they then had notice thereof." The declaration concluded by averring that the plaintiff was ready and willing and offered to convey to the defendants a good and valid estate in fee simple in the said lands, &c., and to perform all things by him to be performed, &c., and requested the defendants to pay him the said several sums of 820*l.*, 4*l.* 8*s.* 7*d.*, and 260*l.*; but that the defendants would not pay, &c.

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Special demurrer as to so much of the declaration as related to the sum of 260*l.*, that it did not appear that the said umpire had power to settle the costs at all; that he had no power to settle them by a separate and distinct instrument, subsequent to the making of his said award; that it did not appear that he had settled the costs within three months after the matters were referred to him, nor that the instrument in writing was an umpirage or award. Joinder in demurrer.

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Watson, in support of the demurrer :

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There are four objections to this declaration. In the first place, assuming the umpire to be the proper person to ascertain the costs of the reference, those costs ought to have appeared in the award itself. This award, however, makes no mention of costs. The arbitrator is *functus officio* upon the award being made, and cannot by a subsequent act settle these costs. The power to refer the matter in dispute here is given by the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18. By the 23rd section, if the compensation claimed or offered exceeds 50*l.*, the party claiming may signify by notice in writing to the promoters of the undertaking his desire to have the question settled by arbitration. The 25th section provides for the appointment of an arbitrator by each of the parties, and the 34th section, which has reference to the costs, provides that "all the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters *of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions." The costs, therefore, as in the ordinary case, ought to be ascertained by the award. In *The London and North Western Railway Company and Quick* (1), *ERLE, J.*, held that the 34th section imposes on an umpire the duty of ascertaining whether the right of the claimant to costs under that section arises, and if it does, of settling their amount in his award, and that he cannot, by a subsequent certificate, entitle the claimant to obtain payment of them. Where the arbitrator has to ascertain the costs, they cannot be ascertained by the officer of the Court: *Morgan v. Smith* (2).

In the second place, these costs ought to have been ascertained by the arbitrators, and not by the umpire. The 34th section expressly provides, that the costs are to be settled by the arbitrators. The 23rd, 32nd, and 33rd sections, speak of "arbitrator or umpire," and by the 27th and 28th sections, the appointment of the umpire is only to take place in case the arbitrators differ.

Thirdly, the declaration is insufficient, as it does not contain any statement that the costs were ascertained within three months after the reference. It never could have been intended that the assessment of costs might be postponed to an indefinite period.

(1) 5 Dowl. & L. 685.

(2) 9 M. & W. 427.

Lastly, the statement that the umpire was required by the plaintiff to settle and determine the costs, does not sufficiently show that he had been required to adjudicate upon their account as arbitrator.

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Martin, contra, was not called upon.

POLLOCK, C. B. :

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I am of opinion that the plaintiff is entitled to the judgment of the Court. The questions raised by this demurrer are four. The third and fourth are not entitled to much consideration, and may therefore be readily disposed of. The third is, that the declaration does not show that the costs to which the plaintiff claims to be entitled were settled by the umpire within three months after he had taken upon himself the umpirage; and that so much of the decision of the referee, whether arbitrator or umpire, as has relation to those costs, is no award at all within the statute. It appears to me, that it is merely a taxation or settlement of costs, which, when settled, become a debt due from the party who ought to pay it. So the fourth objection, that it does not appear from the declaration that the umpire was duly called on to determine the costs according to the statute, or had duly taken upon himself to do so, also fails entirely, for it is stated in the declaration, that he was required by the plaintiff "to settle the costs," which is all that he is authorised to do under the 34th section of the Act in question.

The other two points made were these: *Mr. Watson* says, in the first place, that these costs ought to have been settled by the umpire in his award, he the umpire being the person who had to award; and he says, secondly, if they may be assessed by a separate instrument, it ought not to be by the umpire, but by the arbitrators, because the 34th section mentions arbitrators only as the persons by whom such costs are to be settled. It may be observed, that these objections are inconsistent with each other. The second can only be taken on the supposition that the first is without foundation; for if it be true that these costs ought to be settled in the award itself, then the other objection never could have arisen. It appears to me, however, that neither objection ought to prevail. I think that the costs, in cases like the present, were intended to be settled by a separate instrument, and not by the award itself. That appears to be the result of the 34th section,

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*which is, that "all the costs of any such arbitration, and incident thereto, to be settled"—not awarded—"by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions." It seems to me that the object of this Act of Parliament was, that the compensation for the land taken should be awarded in the first instance, and awarded wholly irrespective of any question as to what offer had been made for it, or what costs had been incurred, and the arbitrators or the umpire were by their award or umpirage simply to determine the amount of compensation. That having been decided, the question of the payment of costs will arise afterwards, and must be determined by the rule laid down in the 34th section, the amount being to be settled by the persons or person who made the award, namely, the two arbitrators, if they agreed to make one, and if not, then the umpire. That disposes of both those objections.

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With respect to the first objection, the case has been cited of *The London and North Western Railway Company* and *Quick*, in which case my brother ERLE discharged the rule on grounds which seem inconsistent with the present decision. But, on examining the facts of that case, it appears that the rule there was very properly discharged, since it was better that the question raised by it should be discussed in an action to be brought between the parties. The 34th section says, "All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters, &c., unless the arbitrators shall award," &c. Now, it is plain, from the construction of the sentence, that the term "to be settled by the arbitrators," must mean the same person or persons by whom the first award was made; and, on referring *to the interpretation clause, sect. 3, the expression "arbitrators" may mean one arbitrator or umpire, or two or more arbitrators. It however clearly means that the same person who makes the award shall be the person to settle the costs. To my mind it is perfectly plain that the umpire who made the award is the person to determine the amount of these costs, and the amount is to depend on whether the award of compensation is for the same or a less sum than was offered in the first instance by the promoters of the undertaking. The sum so actually offered forms no element at

all in the award. When, however, the sum for compensation has been awarded, it will then appear, by comparing it with the sum offered, which of the two parties is entitled to costs; and if the sum offered by the promoters was the same or a greater sum than that awarded, then each party is to pay his own; but if not, then the person who has made the award is to settle the costs, that is, tax the amount of the claim for costs, and settle the amount so claimed; and when that settlement has been made, the promoters are to bear the costs of the arbitration so settled by the person who made the award. It appears to me, therefore, that this declaration contains everything necessary to entitle the plaintiff to the judgment of the Court.

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PARKE, B. :

I agree with my LORD CHIEF BARON in this case, that our judgment ought to be for the plaintiff. I think that all four objections which have been relied upon by the defendant are untenable. The first, and most important, is, that the arbitrator or umpire, as the case may be, must include the taxation of costs like these in his award or umpirage; and this was contended for by analogy to the ordinary practice on submissions to arbitration, where everything to be inquired into must be included in the award. But the ground for that rule is to be found in the agreement of the parties to the submission, in which it is usually one of the terms that the arbitrator *is to make but one award. That condition is implied in all cases, unless something to the contrary is either expressed in or may be inferred from the submission. Here, however, the sole question is, whether, looking at the several clauses of this statute, the Legislature meant that all to be done by the arbitrator or umpire was to be included in a single award or umpirage which he was empowered to make; and I think it quite clear that the Legislature did not intend every matter of dispute to be comprised in a single award. By the 23rd section, the only matter referred to the arbitrators is the compensation to be paid for the lands required to be taken for the purposes of the undertaking—all they have to do is to ascertain the amount that ought to be so paid. Then we come to the 34th section, which directs that all the costs of any arbitration are to be borne by the promoters of the undertaking, unless the arbitrators award the same or a less sum than shall have been offered by the promoters of the undertaking; in which case, each party shall bear his own costs incident to the arbitration,

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and those of the arbitrators shall be borne by the parties in equal proportions; so that the necessity for making the taxation of costs depends entirely on the result of the award, whether a larger sum has been awarded than was offered by the promoters of the undertaking. Now, as my brother ROLFE observed during the argument, the arbitrators or umpire have no power in the first instance to inquire into the costs, or anything beyond the compensation to be made; they are to determine each of the questions separately, the intention of the Legislature being that, so soon as it becomes necessary that the costs of the arbitration should be determined by the arbitrators, they shall have the power to tax them by an instrument other than the award.

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The next objection was, that the 34th section of the statute requires the costs to be settled by the arbitrators, *not the umpire. The rule we have always followed in construing statutes is to take the words in their grammatical sense, unless some inconvenience or incongruity would result from so doing; and if we are to read the clause, "all the costs of any such arbitration and incident thereto to be settled by the arbitrators," according to its grammatical construction, the inconvenience would follow, that unless the arbitrators have made an award for the sum to be paid by way of compensation, there could be no taxation of the costs at all; for the words are, that the costs are to be settled by the arbitrators, and "unless they award the same or a less sum than was offered by the promoters of the undertaking," &c.; so that, if we were to confine the second part of this section to the case of arbitrators, it would be inapplicable where the umpire is called upon to award compensation. To avoid such an absurdity, we must read that latter part of the section as if the words were "unless the arbitrators or umpire shall award the same or a less sum than that offered;" and the word "arbitrators" in the former part of the clause must be read in the same way. An additional reason for this construction is, that the Legislature were more likely to leave the arrangements as to the amount of these costs to the same person who had adjudicated on the transaction in its former stage.

With respect to the decision of my brother ERLE, in *The London and North Western Railway Company and Quick*, which has been relied upon, no one has a higher respect for that learned Judge than myself; but the Court is not so much bound by the decision of a single Judge as if the matter had been adjudicated on by the full Court. I own that the reasons which are there given for allowing

the second objection in that case are not satisfactory to my mind, and I think that the learned Judge was misled by a supposed analogy to the ordinary cases of reference to arbitration, where the powers of the arbitrators are determined by the *language of the submission. No such inference can be drawn from the different clauses in this Act of Parliament; the inference from them is more in favour of the contrary construction, namely, that the award and settlement of costs are to be by two instruments rather than by one.

As to the two last objections, it will not be necessary to say much. The first of them is, that it does not appear that the umpire settled these costs within three months after the matter was referred to him. By the Act of Parliament, the award as to the amount of compensation is to be made within three months after the reference, but not a word is said about the costs being settled within any particular time. It was urged, that delay in settling the costs might be productive of inconvenience; but the party entitled to them can at any time call on the arbitrators or umpire to settle them. It is not likely that any reasonable time would be allowed to elapse; but whenever the party does so call on them, they, having accepted the office of referees, would, I think, be bound to perform the whole of the trust reposed in them.

The last objection is, that there is no averment in this declaration that the parties called on the umpire to adjudicate on these costs; but this fails also, as it alleges that he was called on to settle the amount of costs, and that he did so; and consequently they are bound by the statute to pay them.

ROLFE, B. :

I am entirely of the same opinion. With respect to the first objection, were it not for the judgment of my brother ERLE, in *The London and North Western Railway Company and Quick*, I should have thought the matter entirely free from doubt; for these costs are not to be taxed at all until by a matter extrinsic, that is to say, by looking at the amount awarded, and other explanatory matter to which the award has no reference, we see the relation between the sum awarded and that originally *offered by the promoters. However, in the case which came before my brother Erle, there was good ground for discharging the rule, namely, that the question was one which ought not to be disposed of on a rule, and ought to be made the subject of an action. In the above construction of

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this 34th section, I adopt the able argument of *Mr. Watson* in that case, which does not appear to have had its due weight with the Court.

PLATT, B., concurred.

Judgment for the plaintiff.

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CHAMBRES v. EDWARD JONES, JOHN FOULKES,
WILLIAM MORRIS, AND ROBERT JONES.

(5 Ex. 229—231; S. C. 19 L. J. Ex. 239.)

The 1st and 2nd sections of the Poor Law Audit Act, 1848 (11 & 12 Vict. c. 91), do not transfer the personal liability of overseers, for debts contracted for legal proceedings relating to parish business, to their successors in office.

ASSUMPSIT for work done as an attorney, for money paid, and on an account stated. The defendants Morris and Robert Jones pleaded (*inter alia*) *non assumpserunt*; the other defendants suffered judgment by default. At the trial of the cause, before Cresswell, J., at the last Assizes for Flintshire, the following facts appeared: The plaintiff was an attorney, and the defendants were the churchwardens and overseers of Tryddyn, in the county of Flint; and the action was brought for business done by the plaintiff as an attorney, in the matter of an appeal against an order for the removal of certain paupers from Ellesmere to Tryddyn, made in January, 1847, the plaintiff conducting the business under the verbal instructions of the then parish officers of Tryddyn. The plaintiff, in 1848, made out his bill against the parish for the business done, and had it taxed; but it was arranged that, as a case granted by the Quarter Sessions, on the trial of the appeal, then stood for the opinion of the Court of Queen's Bench, the payment of his bill should be deferred. On May 30, 1849, the case was decided by that Court, and the plaintiff delivered his bill to the defendants. The defendants came into office in April, 1849. The defendant Foulkes was also in office in 1847, and was one of the parties who authorised the business. The defendants Morris and Robert Jones were also in office in the year 1848-9. During their term of office, a vestry was held, and a resolution was come to, and entered in the vestry-book, authorising the payment of the plaintiff's demand. Upon this state of facts, it was contended, on the part of the defendants Morris and Robert Jones, that the defendants were not all jointly liable, inasmuch, as they had not jointly retained the plaintiff or authorised the *business done by

him, and churchwardens and overseers could not, by such a contract, bind their successors. For the plaintiff, the stat. 11 & 12 Vict. c. 91, was referred to. The learned Judge directed a nonsuit, leave being reserved to the plaintiff to move to enter a verdict for himself on the general issue.

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Townsend now moved accordingly :

The present case at first sight appears not to be distinguishable from that of *Marsh v. Davies* (1), and the plaintiff would not contend that it is, were it not for the stat. 11 & 12 Vict. c. 91. By sect. 2, it is enacted, that where any proceedings have been commenced, or shall be hereafter carried on, for or on behalf of any parish in a court of law, regarding any matter affecting the poor rates of such parish, it shall not be necessary that the bill of costs of the solicitor or attorney engaged therein shall be paid before the termination of the proceedings, but in any such case, the amount of the bill, when duly taxed, when otherwise chargeable against the parish, shall be payable out of the poor rates, within the space of one year next following the termination of the proceedings, but not afterwards, unless the Commissioners aforesaid shall by their order authorise the payment of the costs and expenses attending any such proceeding, by annual instalments not exceeding five, to commence from such termination." By the 1st section it is enacted, that if overseers contract debts within three months of the termination of their year of office, their immediate successors shall discharge the same. The words of that section are general—if they "contract any debt." It is submitted that, upon these sections, the defendants are liable.

(PARKE, B. : The statute merely empowers the successors to levy a rate for the payment of the amount, but it does not transfer the *contract from one overseer to another.)

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The plaintiff's remedy therefore, would, as it seems, be by *mandamus* to compel the rate.

POLLOCK, C. B. :

There will be no rule. The statute does not make these officers personally responsible, by transferring the contracts of their predecessors to them. The ruling of the learned Judge was quite correct.

PARKE, B., ROLFE, B., and PLATT, B., concurred.

Rule refused.

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April 16.
May 7.

THE EASTERN UNION RAILWAY COMPANY *v.*
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(5 Ex. 237—239; S. C. 19 L. J. Ex. 287.)

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In an action for railway calls, the plaintiff proved that it was the course of business for C., a clerk, to fill up printed notices of the calls and direct them to the shareholders, and then to put the notices into a basket; and it was the practice for another clerk to post the letters which were in the basket, which he had done on this occasion. C. was dead, but a list of shareholders, containing the name of the defendant, was produced in his handwriting, and indorsed by him, "Letters sent out." C. had received instructions to make out the list, and had been seen filling up and directing the notices, with such a list before him: Held, that the list so indorsed was admissible as evidence that notice of the call had been sent to the defendant, notwithstanding it was not distinctly shown when the indorsement was made.

THIS was an action for railway calls. The declaration contained a count upon the deed of settlement, stating specially the facts of the defendant being the holder of shares, the resolution for a call, &c., and averring notice thereof to the defendant. There was a plea denying the notice, upon which issue was joined.

At the trial, before Wightman, J., at the last Assizes for Suffolk, it appeared that, when a call was made, the course of business at the office of the Company was for a clerk, of the name of Chapman, to fill up printed notices of calls, and direct them, according to a list made out from the address book, in which the shareholders were arranged in Classes A, B, and C, and then to put the notices into a basket; and it was the practice of another clerk to post the letters which were in the basket; and it was proved that he had posted all that were in the basket on this occasion, which were addressed to shareholders in Class C. Chapman was dead, but a list of shareholders, containing the name of the defendant, was produced, which bore an indorsement in his handwriting, "Letters sent out." It was also proved that he had received instructions to make out such list, and that he had been seen in the act of filling up and directing the notices, with such a list before him. It did not appear in which class the defendant's name was. The defendant's counsel objected, that the list produced and indorsement thereon were not admissible as evidence of the notice having been sent, inasmuch as it did not appear when the indorsement was made. The learned Judge received the document in evidence, and a verdict was found for the plaintiffs, leave being reserved for the defendant to move to enter a nonsuit.

O'Malley moved accordingly (April 16).

There was no proof when the indorsement was made on the list, and therefore it was not admissible as evidence of the notice having been sent. It should have been proved to have been a contemporaneous indorsement.

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(PARKE, B.: The Judge must be satisfied by reasonable evidence that the indorsement was contemporaneous.)

The authorities collected in 1 Smith's Lead. Cas. 140, and Taylor on Evidence, s. 406, show that the entry of a deceased clerk is not admissible unless made at the time of the transaction. Besides, the shareholders were divided into three classes, and it did not appear that the defendant belonged to that class to which the notices were given.

Cur. adv. vult.

POLLOCK, C. B., now said :

In this case we think that there ought to be no rule. The ground of the application, and which the Court has taken time to consider, is, whether there was sufficient evidence to justify the learned Judge in receiving a list of shareholders in the handwriting and indorsed by a clerk of the name of Chapman, who was dead. The question was, whether notice of the call had been given to the defendant; and it appeared that a list was made out of persons to whom notice was to be given, and that a list was found indorsed by Chapman as containing the names of the persons to whom he had sent notices; and if that were written contemporaneously with the transaction, there could be no doubt that it was correctly received, according to a class of cases so well known in the profession that it is unnecessary to repeat them. It was contended, for the defendant, that there was a total absence of all evidence that the paper was written within such a period as to be receivable in evidence; but, on looking at the learned Judge's notes, it is clear that, at the time when Chapman was actually engaged in the business of making out the notices, a list was seen in his possession, *such a list as, according to the mode of conducting business, ought to have existed. Subsequently a list was found, corresponding with that, and indorsed by him; and it appears to us, that the learned Judge was perfectly correct in receiving that as evidence. It was for him to decide whether, under the circumstances, the list was receivable in evidence; and we think he correctly decided that it was receivable.

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on the ground that a list was proved to have existed contemporaneously, and a list was produced at the trial corresponding with that which ought to have existed, and indorsed by the deceased. We think the evidence reasonably sufficient to satisfy the mind of any one that the list produced was the same list that Chapman, the deceased, had in his possession at the time he made out the notices. It was objected, that these notices were given to Class C, and it was uncertain whether the defendant was in Class A, B, or C. It appears to us that that is a matter of indifference, because it was not suggested that there was a different call for the different classes. There was only one call, though, in giving the notices, the shareholders were divided into classes. On these grounds, it appears to us that the proof was properly received, and that the verdict was right. Therefore, there will be no rule.

Rule refused.

1850.
April 18.
May 8.

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RIGBY v. HEWITT (1).

(5 Ex. 240—243; S. C. 19 L. J. Ex. 291.)

In an action for negligence, it appeared that the plaintiff was a passenger on an omnibus which was racing with the defendant's omnibus, and, in trying to avoid a cart, a wheel of the defendant's omnibus came in contact with the step of the omnibus on which the plaintiff was riding, which caused the latter to swing towards the kerbstone, and the speed rendering it impossible to pull up, the seat on which the plaintiff sat struck against a lamp-post, and he was thrown off: Held, that the jury were properly directed, that the plaintiff was not disentitled to recover merely because the omnibus on which he sat was driving at a furious rate; and that, if the jury thought that the collision took place from the negligence of the defendant's omnibus, so that the other omnibus was not in fault in not endeavouring to avoid the accident, the defendant was liable.

CASE for negligence in driving the defendant's omnibus, whereby it came in contact with another omnibus on which the plaintiff was sitting, and the plaintiff was thrown off and injured. Plea, Not guilty.

At the trial, before Rolfe, B., at the last Liverpool Assizes, it appeared that the plaintiff was a passenger outside an omnibus which, just before the accident, had started from Market Street, Manchester, at the same time as the defendant's omnibus. The drivers were competing for passengers, each endeavouring to get first; and, while the omnibuses were going at great speed, in trying

(1) Considered in *The Bernina* (1887) 13 App. Cas. 1, 57 L. J. P. 38.—
12 P. D. 38, 71, 56 L. J. P. 38 (affirmed, J. G. P.
sub nom. *Mills v. Armstrong* (1888)

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to avoid a cart which was in the way, the wheel of the defendant's omnibus come in contact with a projecting step of the omnibus on which the plaintiff was riding, which caused the latter to swing towards the kerbstone. The speed with which it was going rendered it impossible for the driver to pull up, and the seat on which the plaintiff sat struck against a lamp-post, and he was thrown off. The learned Judge told the jury, that the plaintiff was not disentitled to recover merely because the omnibus on which he sat was driven at a furious rate; and that, if the jury thought that the collision took place from the negligence of the driver of the defendant's omnibus, and that the other omnibus was not in fault in not endeavouring to avoid the accident, then the defendant was liable. The jury having found a verdict for the plaintiff, with 50*l.* damages,

Bliss moved for a new trial, on the ground of misdirection (April 18):

The plaintiff is in the same situation as the owner of the omnibus on which he was a passenger; and, if the conduct of the driver was such as to disentitle *the owner to sue, the plaintiff cannot recover: *Thorogood v. Bryan* (1). Now, the speed at which that omnibus was driven rendered it impossible to use ordinary precaution in order to avoid the collision or its consequences. But for this circumstance the injury would not have happened, and it was the result of the joint negligence of both parties. The omnibus on which the plaintiff sat would not have been forced against the lamp-post if it had travelled at a proper pace. There was, therefore, an absence of ordinary care on the part of the driver. *Butterfield v. Forrester* (2) decided that a person who is injured by an obstruction in a highway, against which he fell, cannot maintain an action if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction. Lord ELLENBOROUGH, Ch. J., there says, "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right." In *Lack v. Seward* (3), which was an action for the negligence of the defendant's servants in managing a barge, so that the plaintiff's barge was run down, Lord TENTERDEN, Ch. J., ruled that the plaintiff was not entitled to recover if the accident could have been

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(1) 8 C. B. 115.

(3) 4 Car. & P. 106.

(2) 10 R. R. 433 (11 East, 60).

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avoided but for the negligence of the plaintiff's own men, in not being on board his barge at a time when it was lying in a dangerous place. In *Luxford v. Large* (1), which was an action against the captain of a steam vessel for swamping a loaded wherry on the river by a swell produced by a too rapid rate of passage, Lord DENMAN, Ch. J., told the jury, that if they thought that the plaintiff contributed to the injury by his own improper conduct, either in mismanaging or overloading the boat, they must find their verdict for the defendant. *A person driving on the wrong side of the road is bound to use more care to avoid any concussion than would be requisite if he were on the proper side of the road: *Pluckwell v. Wilson* (2). In *Woolf v. Beard* (3), COLERIDGE, J., ruled that, if the plaintiff by his own negligence contributed to the accident, he could not recover, even though the jury should think that the defendant was guilty of negligence. The law was laid down in similar terms by TINDAL, Ch. J., in *Hawkins v. Cooper* (4), and the principle was recognised in *Smith v. Dobson* (5).

Cur. adr. rult.

POLLOCK, C. B., now said :

This was an action tried before my brother Rolfe, at Liverpool, when there was a verdict for the plaintiff, damages 50*l.* It appeared that the plaintiff was a passenger on the top of an omnibus, which was struck by the defendant's omnibus, and the consequence was, that the omnibus on which the plaintiff was, continuing its career, ran against some obstacle, and the plaintiff was thrown off with considerable violence. My brother ROLFE directed the jury to ascertain whether the mischief arose from the negligence of the driver of the defendant's omnibus, and the jury found that the collision did arise from that negligence. *Mr. Bliss* moved for a new trial, on the ground that my brother ROLFE had not directed the jury, that, if the mischief was in part occasioned by the misconduct of the person driving the omnibus on which the plaintiff was, the defendant would not be responsible, the facts being, that the two omnibuses were going at a great rate, and the omnibus on which the plaintiff sat was driven at such a rate that, after the collision, it could not pull up so as to avoid the accident. We are

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(1) 5 Car. & P. 421.

(2) 5 Car. & P. 375.

(3) 8 Car. & P. 373.

(4) 8 Car. & P. 473.

(5) 60 R. R. 451 (3 Man. & G. 59 ;
S. C. 3 Scott, N. R. 336).

rest of the COURT are entirely of opinion, that, generally speaking, where an injury arises from the misconduct of another, the party who is injured has a right to recover from the injuring party for all the consequences of that injury. On the present occasion I entirely concur with the COURT that there ought to be no rule, and that the direction was perfectly right. I am, however, disposed not quite to acquiesce to the full extent in the proposition, that a person is responsible for all the possible consequences of his negligence. I wish to guard against laying down the proposition so universally; but of this I am quite clear, that every person who does a wrong, is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct; and I think that, in the situation of these parties, any distinction which I might be disposed to draw in an extreme case, does not arise in the one which is now before the Court. We are all of opinion that, in this case, there should be no rule.

RIGBY
c.
HEWITT.

Rule refused.

GREENLAND v. CHAPLIN (1).

(5 Ex. 243—248; S. C. 19 L. J. Ex. 293.)

1850.
April 27.
May 8.

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A person who is guilty of negligence, and thereby produces injury to another, cannot set up as a defence, that part of the mischief would not have arisen if the person injured had not himself been guilty of some negligence.

Therefore, where the plaintiff, a passenger on board a steam-boat, was injured by the falling of an anchor, caused by the defendant's steam-boat striking the other steam-boat: Held, that it was improper to direct the jury, that, if they thought the collision was owing to the bad navigation of the defendant's steam-boat, they should find for the plaintiff, unless there was negligence, either in the stowage of the anchor or in the plaintiff putting himself in the place where he was, so as to lead or contribute to the mischief; in which case the plaintiff could not recover.

Quære, per POLLOCK, C. B., whether a person guilty of negligence is responsible for all possible consequences of it, although they could not have been reasonably foreseen or expected.

CASE for negligence in navigating the defendant's steam-boat, whereby it struck against another steam-boat, on which the plaintiff was a passenger, and, in consequence, his leg was broken. Plea, Not guilty.

At the trial, before Pollock, C. B., at the Middlesex sittings after

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(1) Discussed in *The Bernina* (1887) 13 App. Cas. 1, 57 L. J. P. 38).—
12 P. D. 58, 70, 56 L. J. P. 38 (affirmed, J. G. P.
sub nom. *Mills v. Armstrong* (1888)

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last Michaelmas Term, it appeared that the plaintiff was a passenger on board a steam-boat called the *Sons of the Thames*, which was going from Westminster to London Bridge. The defendant's steam-boat, called the *Bachelor*, was going the same way, and, as the vessels approached the Adelphi Pier, the *Bachelor* struck the *Sons of the Thames* on the bow, where the anchor was carried, and, in consequence, it fell upon and broke the plaintiff's leg. There was conflicting evidence as to the degree of negligence attributable to the respective steam-boats, and especially as to the propriety of the mode in which the anchor on board the *Sons of the Thames* was carried in the bow of the vessel. The learned Judge told the jury, that if they were of opinion that the collision was owing to the bad navigation of the *Bachelor*, they should find a verdict for the plaintiff; but if they thought that there was any negligence, either in the stowage of the anchor, or in the plaintiff putting himself in the place where he was, on board the *Sons of the Thames*, they should find for the defendant. The jury having found a verdict for the plaintiff, with 200*l.* damages,

Shce, Serjt., in last Hilary Term obtained a rule *nisi* to set aside the verdict, as against evidence, no objection being taken as to the mode in which the question was left to the jury.

Humfrey and *A. Fry* showed cause (April 27th) :

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The question of negligence was one peculiarly for the jury, and their finding ought not to be disturbed unless it is manifestly wrong. The case was left to the jury too favourably for the defendant, for, as the collision arose from the negligent navigation of the defendant's vessel, it was immaterial in what way the anchor was placed on board the *other vessel. The general rule of law, as laid down in *Davies v. Mann* (1), is, that although there may have been negligence on the part of the plaintiff yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover. PARKE, B., there says, " This subject was fully considered by this Court in the case of *Bridge v. The Grand Junction Railway Company* (2), where, as appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could by ordinary care have avoided the consequences of the defendant's negligence."

(1) 62 R. R. 698 (10 M. & W. 546).

(2) 49 R. R. 590 (3 M. & W. 244).

Even if the jury had thought that the mode of carrying the anchor was improper, the defendant would nevertheless be liable for injury caused by his negligent conduct in striking the anchor: *Sills v. Brown* (1). A trespasser is entitled to compensation for injury done to him by a spring-gun placed without notice on the land on which he trespasses: *Bird v. Holbrook* (2). In *Cattlin v. Hills* (3), where the facts of the case were similar to the present, CRESSWELL, J., told the jury that they must dismiss from their minds all that had been said about the stowing of the anchor, for that the plaintiff would be entitled to a verdict, even though they should think the anchor had been improperly left unfastened. It is not necessary in this case to dispute the authority of *Thorogood v. Bryan* (4).

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Shee, Serjt., *Bramwell*, and *A. W. Simpson*, in support of the rule:

The plaintiff cannot recover if the injury in part arose from the negligent stowage of the anchor. *Thorogood v. Bryan* decided that a passenger in a carriage, or on board a vessel, is so far identified with the owner, *that negligence on the part of the owner or his servant is to be considered negligence of the passenger himself. The persons navigating the *Bachelor* had a right to expect that the anchor of the *Sons of the Thames* would be safely stowed, or, at all events, that passengers would be kept out of the way of injury. The true principle is, that the person injured cannot recover if negligence on his part conduced to the accident. Here three things concurred to cause the injury, viz. the plaintiff placing himself in a dangerous situation, the anchor being improperly stowed, and the defendant's vessel striking the other. This case is governed by *Butterfield v. Forrester* (5), where Lord ELLENBOROUGH said, "One person being in fault will not dispense with another's using ordinary care for himself." That rule was recognised and adopted in *Bridge v. The Grand Junction Railway Company*.

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(POLLOCK, C. B.: Can it be said that a person guilty of negligence is responsible for all the possible consequences, which he could never have foreseen, and which no one would have anticipated? For instance, if a person chooses to walk in a crowded street with

- (1) 9 Car. & P. 601. (1887) 12 P. D. 58, 56 L. J. P. 38;
(2) 29 R. R. 657 (4 Bing. 628; S. C. affirmed, nom. *Mills v. Armstrong*
1 Moo. & P. 607). (1888) 13 App. Cas. 1, 57 L. J. P. 65].
(3) 8 C. B. 123. (5) 10 R. R. 43 (11 East, 60).
(4) 8 C. B. 115 [see *The Bernina*

GREENLAND ^{v.} an open knife under his coat, and another person negligently runs
CHAPLIN. against him, is that other person to be responsible for all the injury
which the knife may inflict on the person who carries it?)

Flower v. Adam (1) is an express authority that, if the proximate cause of damage be the plaintiff's unskilfulness, although the primary cause be the misfeasance of the defendant, the former cannot recover.

Cur. adv. vult.

POLLOCK, C. B., now said :

[*247] In this case, which is very analogous to *Rigby v. Hewitt* (2), and where the same question might have arisen, the plaintiff recovered a verdict, with 200*l.* damages. The foundation of the action was, that a steam-boat *belonging to the defendant, had been so negligently conducted that it ran against a steam-boat on board of which the plaintiff was a passenger, in consequence of which an anchor, which was displaced, fell over and broke the plaintiff's leg. At the trial, the jury found that the management of the vessel on board which the plaintiff was, was right, and that the conduct of the defendant's vessel was negligent and wrong. I must say, though there was evidence on both sides, and it would have been equally satisfactory to me if the verdict had been the other way, that it was a question proper to be disposed of by a jury, and that their verdict ought not now to be disturbed. My brother *Shee* contended, that the accident in part arose from the negligent stowage of the anchor, and from the plaintiff being in a part of the vessel where he ought not to have been. But the jury negatived both these propositions, and found a verdict for the plaintiff, notwithstanding I told them, no doubt incorrectly, that, if they thought either that there was negligence in the stowage of the anchor, or that the accident arose from the plaintiff being in a part of the vessel where he ought not to have been, they ought to find for the defendant. The jury, however, found as a fact, that neither the one nor the other of those matters in reality existed; and the motion for a new trial was made on this ground,—that the law, as laid down by me, was correct, and that the verdict of the jury was wrong, it being against the evidence. I must own that, on the fullest consideration which I can give to the result of the evidence, I am not prepared to say that I am dissatisfied with the verdict; the rule will therefore be

(1) 11 R. R. 591 (2 Taunt. 314).

(2) *Supra*, p. 652 (5 Ex. 240).

discharged. But I may add that, on consideration, I am of opinion that the law, as laid down by me in this respect, was not correct. I entirely concur with the rest of the COURT, that a person who is guilty of negligence, and thereby produces injury to another, has no right to say, "Part of that mischief would not have arisen if you yourself had not been *guilty of some negligence." I think that where the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action; and certainly I am not aware that, according to any decision which has ever occurred, the jury are to take the consequences and divide them in proportion according to the negligence of the one or the other party. But here I may again state, that it occurs to me there is considerable doubt,—and at present I guard myself against being supposed to decide with reference to any case which may hereafter arise; but, at the same time, I am desirous that it may be understood that I entertain considerable doubt, whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this: that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur. I beg to say that, in expressing this doubt whether the responsibility for consequential damage extends to the extreme case to which I have adverted, I am expressing my own opinion only, and not that of the rest of the Court.

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Rule discharged.

KAYE v. BRETT AND ANOTHER.

(5 Ex. 269—274; S. C. 19 L. J. Ex. 346.)

1850.
Feb. 8.
May 8.

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Goods were left by the plaintiff in the warehouse of E. & Co., at Huddersfield, for sale. The defendant, who resided in London, purchased a parcel of the goods, and remitted the price to the plaintiff. The defendants having afterwards purchased some more of the goods, received a letter from T., the clerk of E. & Co., inclosing an invoice and purporting to be written by E. & Co., by the procuration of the plaintiff, stating that they were authorised by the plaintiff to receive payment for him, and requesting the defendant to remit the money to them. The defendant

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accordingly remitted the amount by cheque, inclosed in a letter addressed to E. & Co., and which was delivered at their counting-house; but T. intercepted the letter, and appropriated the money to his own use. T. had authority from the plaintiff to receive money paid over the counter for goods sold in the warehouse, but in no other way: Held, that the receipt by T. was no payment to the plaintiff.

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DEBT for goods sold and delivered. Plea, payment in satisfaction. At the trial, before Patteson, J., at the Yorkshire Summer Assizes, 1849, it appeared that the action was brought to recover 94*l.* 8*s.* for goods sold by the plaintiff to the defendants, under the following circumstances: W. Kaye, the plaintiff's son, carried on the business of a woollen cloth merchant at Huddersfield until the month of October, 1847, when he compounded with his creditors. On the 30th of October, 1847, the plaintiff, who had made advances to W. Kaye upon the security of a warrant of attorney, issued execution thereon, and took possession of W. Kaye's stock in trade, &c. in his warehouse. Shortly afterwards, the plaintiff let the warehouse to Earnshaw, Hinchliffe & Co., and arranged with their salesman to sell his goods. One H. Tozer, who had been in the employ of the plaintiff's son as a book-keeper, remained in the warehouse as book-keeper to Earnshaw & Co. The plaintiff, who was a builder, very seldom came to the warehouse; but a book was kept by Tozer, in which he entered the sale of the plaintiff's goods; he also made out invoices, and was accustomed to receive money paid over the counter for goods sold in the warehouse. The defendants carried on business as woollen warehousemen in London; and in December, 1848, H. Brett, one of the defendants, being at Huddersfield, called at the warehouse of Earnshaw & Co., and purchased some of the plaintiff's goods, to the amount of 30*l.* 7*s.* 3*d.* On the 1st of February, 1849, the defendants received the following letter, containing a statement in reference to these goods:

"GENTLEMEN,—I beg to hand the above small account, which I trust you will find correct. A cheque for amount in course will oblige, gentlemen, your most obedient servant,

"JOSEPH KAYE, pro. H. TOZER.

"P.S.—Please address, care of Earnshaw, Hinchliffe & Co."

The amount was accordingly remitted by letter addressed to the plaintiff, and inclosing a cheque having a blank for the name of the person to whom it was payable. The receipt of the cheque was acknowledged by a letter, of which the following is a copy, the initials "H. T." being those of Tozer:

“HUDDERSFIELD, 10th February, 1849.

“GENTLEMEN,—I beg to acknowledge the receipt of cheque, value 29*l.* 12*s.*, for which am obliged.—Gentlemen, your most obedient servant,
 “Pro. JOSEPH KAYE, H. T.”

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In the month of February H. Brett again called at the warehouse of Earnshaw & Co., and purchased goods belonging to the plaintiff, to the amount of 94*l.* 3*s.* On the 22nd of February the defendants received an invoice of the last-mentioned goods, and a letter, of which the following is a copy :

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“GENTLEMEN,—The goods herewith are forwarded this morning, and trust will open to your satisfaction. Your further favours will oblige, gentlemen, your most obedient servant,

“Pro. JOSEPH KAYE, H. TOZER.”

On the 15th of March, 1849, the defendants received a statement and letter, of which the following is a copy :

“GENTLEMEN,—Mr. Kaye wishes us to say, that he should not have written for payment, but that he understood from Mr. Atkinson that he could have the money whenever he applied for it ; and as he is now much pressed for some large payments, he would allow you an extra discount, say 3 per cent. instead of 2½, if you would be kind enough to send us a cheque for him. We are, gentlemen, your most obedient servants,

“Pro. EARNSHAW, HINCHLIFFE & Co., H. TOZER.”

The defendants wrote in reply a letter addressed to Earnshaw, Hinchliffe & Co., offering to pay the sum due to the plaintiff on being allowed an additional 2½, say 5 per cent. on the amount of the statement ; and at the bottom of that letter was the following memorandum in the handwriting of the defendants' clerk : “Goods, 94*l.* 3*s.* ; claims, 7*s.* 6*d.* ; 5 per cent. 4*l.* 14*s.*—5*l.* 1*s.* 6*d.* 89*l.* 1*s.* 6*d.*.”

The defendants received in answer the following letter :

“HUDDERSFIELD, 16th March, 1849.

“GENTLEMEN,—In reply to your favour of the 15th inst., Mr. Kaye desires us to say, that he thinks you are very *hard upon him ; but, as stated in our last, he is in want of the money. You will therefore please to hand us a cheque per return of post. We cannot say anything about the returns until we see Mr. B. We are, gentlemen, your most obedient servants,

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“Pro. EARNSHAW, HINCHLIFFE & Co., H. TOZER.

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On the 17th of March, the defendants remitted a cheque for 89*l.* 1*s.*, in a letter addressed to Messrs. Earnshaw, Hinchliffe & Co., Huddersfield, and which was delivered at their counting-house. This letter was intercepted by Tozer, who took the cheque to a Bank in Huddersfield, and having obtained cash for it absconded. The learned Judge told the jury, that the only question was, whether the payment to Tozer was payment to the plaintiff, and that depended upon whether Tozer was authorised to receive payment in cheques, and if so, they should find for the defendants. A verdict having been found for the defendants, in last Michaelmas Term a rule *nisi* was obtained to set aside the verdict, and for a new trial, on the ground of misdirection, against which

Cleasby showed cause in the following Hilary Vacation (February 8) :

This case falls within the principle laid down in *Story on Agency*, s. 127, note 2, viz., that "the principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited private instructions unknown to the persons dealing with him." That doctrine is founded on the public policy of preventing frauds on innocent persons, and the encouragement of confidence in dealings with agents. In this case, if the cheque had been sent to Tozer, that would have been a valid payment ; so that the money has in fact come to the hands of a person authorised to give a discharge ; and it is immaterial in what way he got possession * of it.

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(PARKE, B. : If a shopman is accustomed to receive money over the counter, payment to him binds the principal, for there is a representation to all the world that the agent is authorised to receive money in the shop ; but that does not import an authority to receive money in any other way.

ALDERSON, B. : If the plaintiff had directed the defendants to pay the money to a banker, and the defendants had done so, that would have been a good payment ; but here the plaintiff gave no direction that the money should be paid to Earnshaw & Co. on his account.)

The defendants paid the money in the ordinary course of business, and Tozer, as the agent of Earnshaw & Co., was as much authorised to receive it, as if the defendants had gone to the warehouse and paid him.

(PARKE, B. : It is as if the money had been sent by a messenger to Earnshaw & Co., and Tozer had robbed the messenger.)

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If the defendants had gone to the warehouse and asked for Tozer in order to pay him, and a person had come forward and represented himself as Tozer, payment to such person would have been good: *Barrett v. Deere* (1). There was no negligence on the part of the defendants, for it is the universal practice of men in business to trust to letters written by clerks.

Watson and Hugh Hill, in support of the rule :

This was a payment, in fact, to Earnshaw & Co. on behalf of the plaintiff. The defendants could not sue Tozer for this money as received to their use, because he was only the agent of Earnshaw & Co. The defendants never intended to pay Tozer, and he is in the same situation as any third person who might have stolen the letter. The circumstance of his letters being signed "per procura-tion," was sufficient notice to the defendants, and imposed upon them the duty of ascertaining the extent of Tozer's authority: **Attwood v. Munnings* (2), *Alexander v. Mackenzie* (3). It does not appear from the correspondence that there was any implied authority to Tozer to receive the money; but the defendants treat him as merely representing Earnshaw & Co.

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Cur. adv. vult.

PARKE, B., now said (after stating the facts) :

The question is, whether on these facts the receipt of the money by Tozer discharged the defendants. We are clearly of opinion that it did not. Earnshaw & Co. were not authorised to receive the money, and the statement of Tozer to that effect, in the name of Kaye, was false, and therefore the remittance of the money to and the receipt at the counting-house of Earnshaw & Co. was no payment; nor did the defendants mean to pay the money to Tozer, nor was Tozer authorised to receive it in the way in which it was remitted. The receipt, therefore, by Tozer was not a good payment by the defendants to Kaye. If a shopman, who is authorised to receive payment over the counter only, receives money elsewhere than in the shop, that payment is not good. The principal might be willing to trust the agent to receive money in the regular course of business in the shop, when the latter was under his own eye, or

(1) 33 R. R. 487 (Moo. & Mal. 200).

(3) 6 C. B. 766.

(2) 31 R. R. 194 (7 B. & C. 278).

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under the eyes of those in whom he had confidence, but he might not wish to trust the agent with the receipt of money elsewhere. We think that in this case the payment was not good, and that the defendants must suffer from the fraud of Tozer; and consequently, the rule will be absolute.

Rule absolute.

1850.
May 7.

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BRISTOW v. SEQUEVILLE.

(5 Ex. 275—279; S. C. 19 L. J. Ex. 289; 14 Jur. 674.)

A witness, whose knowledge of the law of a foreign country is derived solely from his having studied it at an University in another country, is incompetent to prove what the law of that foreign country is.

A document which, by the law of a foreign country, is not admissible in evidence, for want of a stamp, may, nevertheless, be admitted in this country. But where, by the foreign law, the want of a stamp renders the contract void, it cannot be enforced here.

In order to prove that a certain Company for working mines in Westphalia had never been finally constituted, the plaintiff proved by the solicitor of the Company in this country, that nothing had been done here towards its final constitution: Held, that in the absence of any evidence on the part of the defendant, the jury were warranted in finding that the Company never was finally constituted.

ASSUMPSIT to recover back 200*l.* paid by the plaintiff to the defendant, for certain shares in a projected Company for working mines in Westphalia, called "The Duisburg Iron Company." The declaration set out an agreement, whereby the purchase-money was to be paid by three instalments; and in case the Company should not be finally constituted within six months, or, having been constituted, should be afterwards abandoned, the purchase-money was to be refunded, and the plaintiff to deliver up the stamped receipts to be given by the defendant, on payment of the instalments. It then averred the payment of the instalments, and giving of the receipts, and that the Company was not finally constituted within six months; and alleged as a breach, that the defendant refused to refund the purchase-money.

The defendant pleaded (*inter alia*) a denial of the payment of the purchase-money, and also that the Company was finally constituted within six months. Issues thereon.

At the trial, before Alderson, B., at the London sittings in the present Term, the plaintiff proposed to prove the payment of the purchase-money by certain receipts, which had been given at Cologne, in Prussia, and bore no stamp. It was objected, on behalf of the defendant, that, by the law in force at Cologne, these receipts would be inadmissible in the Courts of that country, for

want of a stamp, and consequently could not be admitted here. The learned Judge ruled, that the *onus* was on the defendant to prove that by the foreign law the receipts required a stamp; and for that purpose, a Dr. *Boch was called as a witness, who stated that he was a juriconsult, and adviser to the Prussian consul in England; that he knew the Code Napoleon, which was produced, was in force at Cologne; and that, by that Code, these receipts would be inadmissible in the foreign Courts, because unstamped; that he had studied law at the University of Leipsic, and from his studies there was able to speak as to the Code Napoleon being the law of Cologne. The learned Judge admitted the receipts in evidence, expressing his opinion, that the foreign law was not sufficiently proved, and that, even if proved, it would not render the receipts inadmissible in England. In support of the allegation, that the Company was not finally constituted, the plaintiff called a person who acted as solicitor of the Company in this country, who proved that nothing had been done in England towards its final constitution. No evidence in answer was given by the defendant. The learned Judge left it to the jury to say whether, in the absence of such evidence, they were satisfied, from the evidence on the part of the plaintiff, that the Company was not finally constituted; and the jury having found a verdict for the plaintiff,

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Scotland now moved for a new trial, on the ground of the improper reception of evidence, and also of misdirection:

First, the witness was competent to prove the law of Prussia, for he had studied at the Leipsic University, and thus had the means of obtaining a knowledge of it; and whether that knowledge was acquired by study or practice is only a ground for observation on the value of his evidence.

(PLATT, B.: According to that argument, a Dutchman, who had studied law at an English University, would be competent to give evidence of the law of England.

ALDERSON, B.: If a man who has studied law in Saxony, and never practised in Prussia, is a competent witness to prove the law of Prussia, why may not a Frenchman, *who has read books relating to Chinese law, prove what the law of China is?)

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In *Baron de Bode's* case (1) the testimony of a French advocate,

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(ALDERSON, B. : Would a person who had never been in England, but had studied the law of England at a foreign University, be competent to prove what the law of England is?)

His evidence would be admissible, although it might be of little value.

(POLLOCK, C. B. : In a case depending on medical testimony, would the evidence of a person be admissible who had studied medicine at one of the Universities, but had never practised it?)

If the science had been the avowed object of his study, his testimony would be admissible, and that is analogous to this case; for here the witness had expressly studied the law of Prussia at the University of Leipsic.

(ROLFE, B. : If you are correct, it would be sufficient to call any person as a witness who had studied the law of Prussia at the University of Oxford.)

According to the case of *Vanderdonckt v. Thellusson* (1), any person conversant with foreign law, though not a professor of it, or connected with the profession, is a competent witness to prove it.

Secondly, assuming that the foreign law was sufficiently proved, the receipts were not admissible in evidence. By the comity of nations, the Courts of this country notice the revenue laws of foreign States. In *Alves v. Hodgson* (2), it was held, that a promissory note not stamped as required by the law of Jamaica was not receivable in evidence here. Lord KENYON there says, "It is said that we cannot take notice of the revenue laws of a foreign country; but I think we must resort to the laws of the country in which the note was made, and unless it be good *there, it is not obligatory in a court of law here."

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(POLLOCK, C. B. : That decision proceeded on this ground, that, if it be not a contract at the place where it is alleged to be made, it is no contract at all.

ALDERSON, B. : It is very different, whether the law makes a stamp necessary to the validity of an instrument, or to its

(1) 79 R. R. 761 (8 O. B. 812).

(2) 4 R. R. 433 (7 T. R. 241).

admissibility in evidence. An unstamped deed is a valid contract here, although it cannot be given in evidence. If, by the law of a foreign country, a document is only inadmissible for want of a stamp, it is a valid contract, and receivable in evidence in another country.

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POLLOCK, C. B.: *James v. Catherwood* (1) is an authority in point; there the defendant's counsel objected, that certain receipts for money lent in France were inadmissible, and offered to show that, by the law of France, such receipts required a stamp; but ABBOTT, Ch. J., admitted them; and, on motion for a new trial, said, "This point is too plain for argument. It has been settled, or at least considered as settled, ever since the time of Lord HARDWICKE, that, in a British Court, we cannot take notice of the revenue laws of a foreign State. It would be productive of prodigious inconvenience, if, in every case in which an instrument was executed in a foreign country, we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid." Also, in *Holman v. Johnson* (2), Lord MANSFIELD says, "No country ever takes notice of the revenue laws of another.")

Thirdly, the *onus* was on the plaintiff to prove that the Company was not finally constituted; and, upon the evidence, the jury ought to have been directed to find for the defendant. It was a Company to be put in operation abroad, and there was no evidence that nothing had been done towards its final constitution there.

POLLOCK, C. B.:

There ought to be no rule. The questions *as to the stamp, and the evidence of the foreign law, have been disposed of during the argument. With respect to the remaining point, I think the learned Judge was quite right in leaving it to the jury, and they were right in deciding the matter in the negative. It is said that there ought to have been some distinct evidence that the Company was not finally constituted abroad; but it appears to me sufficient to give such evidence as raises a reasonable doubt as to the fact of the constitution of the Company; and the plaintiff having given evidence *prima facie* inconsistent with the existence of the Company, and the defendant having given no evidence at all, the jury were well warranted in finding that the Company was not finally constituted.

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(1) 3 Dowl. & Ry. 190.

(2) Cowp. 343.

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ROLFE, B. :

The marginal note of *Alves v. Hodgson* is perfectly correct, although I cannot help thinking that there must be some mistake in the report of the case. The marginal note is in these terms: "The plaintiff cannot recover upon a written contract made in Jamaica, which, by the laws of that island, was void for want of a stamp." I agree that if for want of a stamp a contract made in a foreign country is void, it cannot be enforced here. But if that case meant to decide, that where a stamp is required by the revenue laws of a foreign State before a document can be received in evidence there, it is inadmissible in this country, I entirely disagree. If that were so, it would be impossible to get out of this dilemma, that if a document were properly stamped according to the law of this country, it could not be given in evidence here, because it was improperly stamped according to the law of a foreign country where it was given.

ALDERSON, B., and PLATT, B., concurred.

Rule refused.

1850.
May 1.

VERTUE v. THE EAST ANGLIAN RAILWAYS COMPANY.

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(5 Ex. 280—286; S. C. 19 L. J. Ex. 235; 1 L. M. & P. 302; 6 Rail. Cas. 252.)

The transferee of a bond, transferred to him under the provisions of the Companies Clauses Consolidation Act, (8 & 9 Vict. c. 16,) is the party in whose name an action upon the bond must be brought.

DEBT on bond. The defendant craved *oyer* of the bond, which was as follows: "The East Anglian Railways Company. Bond, No. 68. 1,000*l*. By virtue of the East Anglian Railways Act, 1847, we, the East Anglian Railways Company, in consideration of the sum of 1,000*l*. to us in hand paid by George Vertue, of &c., do bind ourselves and our successors unto the said George Vertue, his executors, administrators, and assigns, in the penal sum of 2,000*l*. The condition of the above obligation is such, that, if the said Company shall pay to the said George Vertue, his executors, administrators, or assigns, on the 31st of December, 1850, the principal sum of 1,000*l*., together with interest for the same, at the rate of 5*l*. per cent. per annum, payable half-yearly on the 30th of June and 31st of December, then the above-written obligation is to become void, otherwise, &c. Given under our common seal, &c. Every transfer of this bond must, in order to its validity, be

produced to the Secretary of the Company, that it may be registered Note.—The interest on this bond will be paid half-yearly by Messrs. B. & Co., on production of the interest coupons, and no interest will be paid except upon production of such coupons.”

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The defendants pleaded, secondly, that, after the passing of the said Act, and after it came into operation, and before the commencement of the suit, to wit, at the time of the making of the said supposed writing obligatory, the defendants, being the East Anglian Railways Company mentioned in and incorporated by the said Act, and by virtue of its powers, borrowed and took up at interest of the plaintiff a certain sum of money, to wit, the sum of 1,000*l.*, upon security of the said supposed bond, which they then gave to the plaintiff, sealed with their common seal, and subject to the said condition, &c.; and further, that, after the *making of the said supposed writing obligatory, and within fourteen days after the date thereof, and before the making of the transfer hereinafter mentioned, to wit, on &c., an entry and memorial of the said bond, specifying the number of the said bond, to wit &c., also its date, to wit &c., also the sum of money secured thereby, to wit &c., also the names of the parties to the said bond, with their proper additions, to wit &c., were duly and in pursuance of the said Act made in the register of mortgages and bonds then, to wit, on &c., kept by W. W., the then secretary of the defendants; and further, that afterwards, and before the commencement of the suit, to wit, on &c., the plaintiff was the party entitled to the said bond and to the said sum of money, to wit &c., and to the interest so secured thereby; and being the party so entitled, he the plaintiff then by deed sealed with his seal, and which, being in the possession of Sir Charles William Taylor, Bart., hereinafter mentioned, the proper owner thereof, the defendants cannot produce to the Court here, the date whereof is &c.; the said last-mentioned deed then being a deed duly stamped, and wherein the consideration for the transfer thereby made was truly stated, the plaintiff, by virtue and in pursuance of the provisions of the said Act, transferred the said bond, and all his right and interest in and to the said money thereby secured, to the said Sir C. W. Taylor, Bart., of &c.; and further, that, after the making of the said last-mentioned deed and of the said transfer thereby made, and within thirty days thereof, and before the commencement of the suit, to wit, on &c., the said deed and transfer were duly produced to the said W. W., the secretary of the defendants, and who, as such secretary, then, to wit, on &c.,

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acted as and was such secretary, and who, as such secretary, then, to wit, on &c., kept the said register of mortgages and bonds; and the said W. W., so being such secretary as aforesaid, thereupon forthwith, and before the commencement of the suit, to wit on, &c., and according *to the provisions of the said Act, caused an entry and memorial of the said last-mentioned deed and transfer to be duly made in the said register of mortgages and bonds, in the same manner in all respects as had been done in the case of the said bonds (specifying the date, amount, &c., as before); and further, that the said transfer, and the said entry and memorial of the said transfer, &c., being so made as aforesaid, and immediately after the making of the said last-mentioned entry and memorial, and before the commencement of the suit, to wit, on &c., the plaintiff ceased to be entitled to any right or interest in respect of the said supposed writing obligatory in the declaration mentioned, or to the money thereby secured; and further, that the said transfer, and that the said entry and memorial thereof, having been so made as aforesaid, thereupon and immediately after the making thereof, to wit, on &c., the said transfer, by virtue of the said Act, entitled the said Sir C. W. Taylor, Bart., to the full benefit of the said bond in all respects; and that he hath been and still is so entitled thereto, &c. Verification.

Special demurrer, assigning for causes, that the plea was bad, and that action was correctly brought in the name of the plaintiff; that the plea did not state that the plaintiff was suing in his own right, and not as trustee of Sir C. W. Taylor; that it did not show that the bond was one which could be assigned under the East Anglian Railways Act and the 8 & 9 Vict. c. 16; and that it did not sufficiently allege that the bond was duly registered, or that a proper entry was made, so as to entitle Sir C. W. Taylor to the benefit of it, or that he had ever had notice of the deed of transfer, or that he accepted it. Joinder in demurrer.

Prentice, in support of the demurrer :

[*283] The substantial question for the opinion of the Court is, whether the action is properly brought by the plaintiff, or whether it *ought to have been brought by the alleged assignee of the bond. The Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, is incorporated by the East Anglian Railways Act, 10 & 11 Vict. c. cclxxv. s. 5, and by the 28th section of the latter Act the Company are authorised to borrow money on mortgage or bond. By the 41st

section of the 8 & 9 Vict. c. 16, "Every mortgage and bond for securing money borrowed by the Company shall be by deed under the common seal of the Company, duly stamped, and wherein the consideration shall be truly stated; and every such mortgage deed or bond may be according to the form in the schedule (C) or (D) to this Act annexed, or to the like effect." And by the 46th section: "Any party entitled to any such mortgage or bond may from time to time transfer his right and interest therein to any other person; and every such transfer shall be by deed, duly stamped, wherein the consideration shall be duly stated; and every such transfer may be according to the form in the schedule (E) to this Act annexed, or to the like effect." By the 47th section it is enacted, that, "Within thirty days after the date of every such transfer, if executed within the United Kingdom, or otherwise within thirty days after the arrival thereof in the United Kingdom, it shall be produced to the secretary, and thereupon the secretary shall cause an entry or memorial thereof to be made in the same manner as in the case of the original mortgage; and, after such entry, every such transfer shall entitle the transferee to the full benefit of the original mortgage or bond in all respects; and no party having made such transfer shall have power to make void, release, or discharge the mortgage or bond so transferred, or any money thereby secured," &c. The defendant will contend that, after the transfer of the bond, not only the transferor's right and interest in the bond is transferred, but also the right of bringing an action upon it. At common law, the right of action is not assignable; and therefore, *unless the right of action is expressly transferred by Act of Parliament, the action ought to be brought in the name of the transferor. [He cited *Jeffery v. M'Taggart* (1).]

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(ROLFE, B.: There is this distinction to be observed between this case and the one you rely upon: there the property is only once assigned, but here the bond may be frequently transferred.)

The right to sue ought to be expressly given. This is done in several Acts. Thus, the Bankrupt Act, 6 Geo. IV. c. 16, s. 63, enacts, that the "assignees shall have like remedy to recover the same in their own names, as the bankrupt himself might have had if he had not been adjudged bankrupt." And the same is *the case in the 4 Anne, c. 16, s. 20, relating to bonds, and the 11 Geo. II.

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c. 19, which relates to replevin bonds. (He also relied upon the objections raised by the special grounds of demurrer.)

Bramwell, *contrd*, was stopped by the Court.

POLLOCK, C. B. :

I am of opinion that the defendants are entitled to judgment in this case. Under the terms of the general Act of Parliament, the property in the bond is transferred, with all the transferor's right and interest and benefit therein. These are the three expressions in the 46th and 47th sections of the Act; and as it contains a special power of transfer, and as a mere assignment of a chose in action did not require an Act of Parliament, it must therefore be inferred that it was intended that the statute should give all the legal interest, and that a legal transfer for all intents and purposes should be made. And how can it be said, that a party has the entire legal right, interest, and benefit in the instrument, unless he also has the power of suing upon it in his own name? It therefore becomes unnecessary to distinguish this case from that of *Jeffery v. M'Taggart*, for neither are the words of the statute upon which that decision turned the same as those in the present Act, nor are the objects for which it was passed the same. The object of this Act is clearly to make these bonds in a way negotiable: not generally negotiable, but to the extent that all the transferor's right, interest, and benefit in the instrument should be transferred to his transferee as soon as the required form shall have been gone through. I therefore must say, that I entertain no doubt whatever that the action ought to have been brought in the name of the transferee of the bond, and not in that of the original obligee. With respect to the objections raised by the special demurrer, I do not think that any of *them are tenable. The defendants, therefore, are entitled to judgment.

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ROLFE, B. :

I am of the same opinion. The only substantial question is, whether the assignor or the assignee of the bond is the proper party to sue upon it; and I think that it is abundantly clear, from the different sections of the Act, that the assignee is that party. If it were not so, the power given by the Act would become almost nugatory. Where is the use of all the machinery relating to the transfer of these bonds, if the transferees are not to be the legal

bondholders for all intents and purposes? By reference to the 45th clause of the Companies Clauses Act, it appears that the book of the transfer of these bonds is to be open to the members and to the creditors. Who are these parties? Clearly not they who, twenty years before, had been bondholders, but those parties whose names would at that time appear upon the books. The parties who are registered are the bond creditors, and are entitled to sue like other creditors.

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PLATT, B. :

It seems to me that the 46th section gives the power to a bondholder to transfer all his legal title in the bond to the transferee. It was no doubt considered that a very great advantage would be conferred upon both the borrowers and lenders of money in these transactions by giving a *quasi* negotiability of character to these instruments. Thus, a party who has lent money may dispose of his interest in his bond as he might of any property he possesses in the funds.

Judgment for the defendants.

RENNIE AND ANOTHER v. CLARKE.

(5 Ex. 292—293; S. C. 19 L. J. Ex. 278.)

1850,
April 22,
May 8.

[292]

In an action by the plaintiffs for work done as engineers for a Railway Company, of which the defendant was a member of the provisional committee, the plaintiffs gave in evidence certain resolutions of the committee, made at meetings, at which the defendant was present. The defendant offered in evidence a resolution to the effect that engineers should be employed, but that the members of the provisional committee were not to incur any personal responsibility; but at that meeting the plaintiffs were not present: Held, that the resolution was receivable in evidence.

ASSUMPSIT for work and labour. Plea (*inter alia*). *Non assumpsit*; upon which issue was joined.

At the trial of the cause, before Pollock, C. B., at the London sittings after last Term, it appeared that the action was brought by the plaintiffs, as joint engineers, for work done by them, against the defendant, a member of the provisional committee of the Direct East and West Junction Railway Company. In order to prove the joint employment of the plaintiffs by the defendant, the plaintiffs put in evidence all the resolutions of the provisional committee at meetings when the defendant was present, and in which he took part. The case set up by the defendant was, that the plaintiffs, or one of them, were to hold him harmless, and that he was to be

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free from all personal liability. In order to establish this defence, the defendant offered in evidence a resolution to the effect that the engineers were to be employed, and that they were to give the usual bond of indemnity to the members of the provisional committee, and that such bond should be immediately ready for execution, so as to free them from all responsibility. Neither the plaintiffs nor the defendant were present at the meeting at which this resolution was passed, nor had the plaintiffs notice of it. The plaintiffs thereupon objected to the admission of this evidence, but the LORD CHIEF BARON overruled the objection, and admitted it. The defendant obtained a verdict.

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In the present Term (April 22),

Bovill moved for a new trial, on the ground (*inter alia*) that this evidence was improperly admitted, and contended that, as the acts of the members of a provisional committee are not binding upon other members, unless it be shown that they have assented to them, the evidence ought not to have been received. The COURT intimated that they were of opinion that the evidence was admissible, but took time to consider whether, upon the whole case, the plaintiffs were entitled to a rule.

Cur. adv. vult.

PARKE, B., now said :

There is no doubt that the LORD CHIEF BARON was perfectly right in receiving in evidence the resolution, to the admissibility of which the plaintiffs objected. It would not appear until the conclusion of the cause, whether the case was to rest upon the actual authority given by the defendant to the other members of the provisional committee, or to persons acting by their authority, or whether the defendant himself had personally employed the plaintiffs. That being so, the defendant had a perfect right to show, that by the terms under which he and the other members of the provisional committee had entered into the undertaking, they were not to incur any personal responsibility, and that each member was not to have the power of binding the rest. There can be no question, therefore, that this evidence was receivable. His Lordship, after proceeding to dispose of the other objections, said,—We all agree that there ought to be no rule.

Rule refused.

DOE D. ELIZABETH WILLIAMS *v.* HOWELL.

(5 Ex. 299—301 ; S. C. 19 L. J. Ex. 232.)

1850.
April 15.

[299]

An action having, by an order of Nisi Prius, been referred to an arbitrator who was to settle all matters in difference between the parties, and to order and direct as to the proper distribution of certain property, as to him should seem fit, he accordingly made his award, and awarded (*inter alia*) that the plaintiff "do, on or before the 23rd of March next, duly execute an indenture to be prepared by H. H. (the defendant), in words and figures following," (setting it out). No demand of the execution of the instrument was made upon the plaintiff before or on the day mentioned in the award : Held, that the plaintiff was not liable to an attachment for refusing to execute the deed on demand made after the 23rd of March.

SIR F. THESIGER had obtained a rule calling upon the lessor of the plaintiff, Elizabeth Williams, to show cause why an attachment should not issue against her for contempt in not executing a certain indenture, pursuant to the directions contained in an award. It appeared by the affidavits, that an action of ejectment had by an order of Nisi Prius been referred to an arbitrator, who was thereby empowered to settle all matters in difference between the parties ; and to make what should be a proper distribution of certain property, in accordance with the statement made by the lessor of the plaintiff, immediately after the funeral of the testator John Howell, deceased ; and how such distribution should be enforced ; and to order and determine what he should think fit to be done by the parties respecting the matter in dispute. The arbitrator by his award, dated the 23rd of February, 1848, awarded, "that the said E. Williams do, on or before the 23rd day of March next, duly execute an indenture, to be prepared by and at the expense of the said Howell Howell, and to be in the words or to the tenor and effect following." The indenture was then set out in the award. No demand of the execution of the indenture was made on or before the 23rd of March ; but upon three subsequent occasions an engrossment of the above-mentioned indenture was tendered to the lessor of the plaintiff for execution, which she refused to execute.

Martin and Hance showed cause :

The lessor of the plaintiff has not rendered herself liable to an attachment by her refusal to execute the deed, as it appears that a condition precedent to such obligation has not been observed by the party who seeks this form of remedy against her. There was not any execution by Howell Howell of the *deed, nor any tender of it to her for her execution before the day specified in the award. If

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an action had been brought for the non-performance by her of this award, the declaration would have been bad in arrest of judgment, if the allegation of the performance of this condition precedent had been omitted in it. And it is perfectly clear that an attachment will not be granted where an action could not be maintained for the same matter.

Watson and Lydekker, in support of the rule :

Time is not of the essence of this contract. The party would be bound to execute the deed at any time. The substance of the contract is, that she is to execute the deed. This is analogous to the ordinary case where it is the duty of the arbitrator to find whether a sum of money is due, and by whom it is to be paid ; and in such case, if he directs the money to be paid on a particular day, and it is not paid on or before the time, an attachment will be granted, although a previous demand had not been made : *In re Craike* (1).

(PARKE, B. : In such case a demand is not necessary ; but here there has been no disobedience of the rule of Court, unless she was bound to execute the deed at any time.)

The duty imposed is of a continuing character.

PARKE, B. : There is good reason why a particular time should be fixed for the execution of the instrument, for that act might be of much importance to her with reference to subsequent arrangements.

ROLFE, B. : It does not appear from the affidavits that the deed was ready at the time mentioned in the award.)

POLLOCK, C. B. :

This rule must be discharged. Whether the defendant has any remedy or not against the lessor of the plaintiff, is a matter which it is not necessary now to consider. I am inclined to think that he has not ; but it is clear that the refusal to execute the deed after the day mentioned in the award has not rendered this party liable to an attachment for disobedience to the order. The view I take of an attachment is even stronger than that in which it was placed by *Mr. Martin* in his argument ; for I consider that it by no means follows that, where the non-performance of an award would support an action, in every such case an attachment would be granted. By

(1) 7 Dowl. P. C. 603.

the terms of this award, the deed was to be executed before or upon a certain day therein specified. That day has elapsed without any previous application having been made to the party for the due execution of it. There is therefore no sufficient ground for an attachment.

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PARKE, B. :

I am of the same opinion. I very much doubt whether the defendant has any remedy in any shape in this case ; for I cannot say that time is clearly not of the essence of this contract. But the matter ought to be free from doubt, to induce us to grant an attachment. I am inclined to be of opinion that the party, having let slip the day for the execution of the deed, has lost all remedy ; but it is not necessary to decide that matter now. The propriety of our decision cannot be questioned on a motion for an attachment, as it might be in an action.

ROLFE, B. :

I am of the same opinion. The case suggested by *Mr. Watson*, of the payment of money under an award, fails altogether of having any application to the present case ; for there nothing is to be done besides the mere payment of the money. But here the party, in order to obtain an attachment, ought to show that a condition precedent has been performed. That has not been done here, and therefore this application must fail.

Rule discharged.

SHIELD v. WILKINS (1).

(5 Ex. 304 ; S. C. 19 L. J. Ex. 238.)

1850.
April 29.

[304]

Under the terms of a charter-party, the plaintiff's ship was to proceed to B., or as near thereto as she could safely get, and to load from the defendant's agent a full cargo of timber. The vessel proceeded within the harbour at B., and there received a portion of the cargo, but owing to want of water she was then taken without the bar, but as near as she could safely get, where it was requested that the rest of the cargo should be delivered, which was refused : Held, that the plaintiff had complied with the charter-party, and that the defendant was liable for such refusal.

ASSUMPSIT on a charter-party, to recover 652*l.* 17*s.* 6*d.* for dead freight, in respect of the defendant's not having loaded a full cargo, according to the charter-party. The defendant pleaded several pleas, and, after issue joined, by an order of ALDERSON, B., the following case was stated for the opinion of this Court :

(1) See *The Alhambra* (1881) 6 P. D. 68, 50 L. J. Ad. 36.—J. G. P.

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The charter-party provided that the plaintiff's ship should proceed to Riga *via* Bolderaa, or as near thereto as she could safely get, and there load from the agents of the affreighter a full cargo of fir timber. At the time of signing the charter, both parties knew that a full cargo could not be loaded inside the bar at Bolderaa, and the vessel proceed therewith to sea. The vessel arrived at Bolderaa, which is inside a bar, it being a bar harbour. The defendant's agents having loaded the ship inside the bar to the full extent to which she was capable of being loaded consistently with her being able to get out of the harbour over the bar, the vessel left the harbour, and came to anchor as near to Bolderaa as she could safely get outside the bar, for the purpose of taking in the remainder of a full cargo. The defendant's agents refused to give cargo outside the bar at the charterer's expense, contending that the charterer was not liable under the charter-party to give cargo outside the bar. The ship thereupon sailed and returned to Liverpool.

The question for the opinion of the Court was, whether, under the above circumstances, the plaintiff was entitled to recover for dead freight in respect of the defendant's not having loaded a full cargo, according to the terms of the charter-party.

The *Attorney-General*, for the plaintiff :

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It is difficult to conceive any sound argument that can be advanced in *favour of the defendant's case. The parties knew the draught of the vessel, and the depth of water within the bar, and that the vessel could not load a full cargo within the bar ; and for that reason, no doubt, the term was inserted, that the vessel should be taken as near thereto as she could safely get, so as to enable her to get away in safety with a full cargo.

Martin, contra :

The defendant contends that he has complied with the charter-party by offering to deliver a full and complete cargo at the place where the vessel had elected to go. It was not in the contemplation of the parties that the vessel was to be loaded at two different places.

POLLOCK, C. B. :

Upon the facts of the present case, I am clearly of opinion that the plaintiff is entitled to our judgment ; for, according to the

terms of the charter-party, the vessel need not have crossed the bar at all, as she was only called upon to go as near to Bolderaa as she could safely go, and she went inside solely for the defendant's accommodation and to save him expense.

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ROLFE, B. :

It is perfectly clear what the meaning of this contract is,—that the vessel cannot be said to get safely to that place from which she cannot safely get away with a full cargo. The word “safely” means safely as a loaded vessel. Suppose the place to have been such that she could not have taken in with safety to herself a single deal, that would not have been a place whereto she could safely get; and, consequently, as she could not safely get away from within the bar with a full cargo, that was not such a place within the terms of this charter-party.

PLATT, B., concurred.

Judgment for the plaintiff.

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(5 Ex. 312—330; S. C. 20 L. J. Ex. 417.)

1850.
May 4.

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In the specification of a patent for “improvements in looms for weaving,” the plaintiff declared that his improvements applied to that class of machinery called power-looms, and consisted “in a novel arrangement of mechanism, designed for the purpose of instantly stopping the whole of the working parts of the loom whenever the shuttle stops in the shed.” He then described the manner in which that was done in ordinary looms, and proceeded thus: “The principal defect in this arrangement, and which my improvement is intended to obviate, is the frequent breakage of the different parts of the loom, occasioned by the shock of the lathe or slay striking against the ‘frog,’ (which is fixed to the framing). In my improved arrangement the loom is stopped in the following manner: I make use of the ‘swell’ and the ‘stop-rod finger’ as usual; the construction of the latter, however, is somewhat modified, being of one piece with the small lever which bears against the swell; but instead of its striking against a stop or ‘frog’ fixed to the framing of the loom, it strikes against a stop or notch upon the upper end of a vertical lever, vibrating upon a pin or stud. The lever is furnished with a small roller or bowl, which acts against a projection on a horizontal lever, causing it to vibrate upon its centre, and throw a clutch-box (which connects the main driving-pulley to the driving-shaft) out of gear, and allows the main driving-pulley to revolve loosely upon the driving-shaft at the same time that a projection on the lever strikes against the ‘spring handle,’ and shifts the strap; simultaneously with these two movements the lower end of the vertical beam causes a break to be brought in contact with the fly-wheel of the loom, thus instantaneously

(1) Cited in *Wren v. Weild* (1869) L. R. 4 Q. B. 730, 38 L. J. Q. B. 327.—J. G. P.

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stopping every motion of the loom without the slightest shock." After the date of the plaintiff's patent, the defendant obtained a patent for "improvements in and applicable to looms for weaving;" and amongst them he claimed a novel arrangement of apparatus for throwing the loom out of gear when the shuttle failed to complete its course. In the defendant's apparatus, the clutch-box was not used, but, instead of it, the stop-rod finger acted on a loose piece or sliding frog; and instead of a rigid vertical lever, as in the plaintiff's machine, the defendant used an elastic horizontal lever, and by reason of the pin travelling on an inclined plane, the break was applied to the wheel gradually, and not simultaneously. The jury found that the plaintiff's arrangement of machinery for stopping looms by means of the action of the clutch-box, in combination with the action of the break, was new and useful; also, that the plaintiff's arrangement of machinery for bringing the break into connection with the fly-wheel was new and useful; and that the defendant's arrangement of machinery for the latter purpose was substantially the same as the plaintiff's: Held, upon these findings, first, that the specification was good; secondly, that the defendant had infringed the patent.

CASE for the infringement of a patent for "an invention of certain improvements in looms for weaving." The declaration, which was in the usual form, assigned the following breaches: That the defendant put in practice a part of the invention, and also did counterfeit, imitate, and resemble the invention; and also did make and cause to be made divers additions to the invention and subtractions from the same, whereby to pretend himself the inventor or deviser of such invention.

Pleas: First, Not guilty; secondly, that the plaintiff was not the true and first inventor; thirdly, that the invention was not new as to the public knowledge, use, and exercise thereof; fourthly, that the plaintiff did not by the specification particularly describe and ascertain the nature of the invention; fifthly, that the plaintiff did not, within six calendar months next after the date of the letters
[*313] *patent, cause a specification to be inrolled in the Court of Chancery; sixthly, that the plaintiff by his petition represented to her Majesty that the invention was an invention of improvements in looms for weaving; that her Majesty, confiding in such representation, and in consideration thereof, granted the letters patent, and that the representation so made was false and untrue; seventhly, that the invention was not of any use, benefit, or advantage whatsoever to the public. The plaintiff joined issue on the first, second, fourth, and fifth pleas, and replied to the third, sixth, and seventh by traversing the allegations contained therein respectively.

The defendant's notice of objections was in terms similar to the pleas.

At the trial, before Wightman, J., at the Liverpool Summer

Assizes, 1849, it appeared that the patent in question was granted to the plaintiff in March, 1845, and that the specification, after reciting the letters patent, proceeded as follows :

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“ My improvements in looms for weaving apply to that class of such machinery now commonly called or known as ‘ power-looms,’ and consists in a novel arrangement of mechanism, designed for the purpose of instantly stopping the whole of the working parts of the loom, whenever the shuttle ‘ stops in the shed ; ’ that is to say, whenever it does not complete its course from one shuttle-box to the other. In ordinary power-looms this object is effected in the following manner : Each shuttle-box is provided with what is called a ‘ swell,’ (which projects from the outside of the shuttle-box whenever the shuttle is in the box,) against which a small lever fixed upon the ‘ stop-rod ’ bears ; upon the stop-rod is also fixed another small lever or finger, which (whenever the shuttle is absent from both boxes at once, and consequently the ‘ swell ’ does not project), falls down and comes in contact with a stock-piece called the ‘ frog,’ which is fixed to the framing, thus preventing the lathe or slay beating up any further and injuring the cloth. At the same time, a small apparatus fixed to the slay strikes against the ‘ spring handle ’ of the loom, and causes it to shift the driving-strap from the fast pulley on to the loose one, and thus stop the action of the loom. The principal defect in this arrangement, and which my improvement is intended to obviate, is the frequent breakage of the different parts of the loom, occasioned by the shock of the lathe or slay striking against the ‘ frog ’ (which is fixed to the framing), especially if the loom is working rather fast. In my improved arrangement the loom is stopped in the following manner : I make use of the ‘ swell ’ and the ‘ stop-rod finger ’ as usual ; the construction of the latter, however, is somewhat modified, being of one piece with the small lever, which bears against the ‘ swell ; ’ but instead of its striking against a stop or ‘ frog ’ fixed to the framing of the loom, it strikes against a stop or notch upon the upper end of a vertical lever, vibrating upon a pin or stud. This lever is furnished with a small roller or bowl, which acts against a projection on a horizontal lever, causing it to vibrate upon its centre, and throw a clutch-box (which connects the main driving-pulley to the driving-shaft) out of gear, and allows the main driving-pulley to revolve loosely upon the driving-shaft, at the same time that a projection on the lever strikes against the ‘ spring handle,’ and shifts the strap. Simultaneously with these

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 instantaneously stopping every motion of the loom without the
 slightest shock, at whatever speed the loom may be working.”
 [The specification then proceeds to describe the invention in
 [316] detail, by reference to a drawing.] “Having now described the
 nature and object of my said invention, together with the manner
 of carrying the same into practical effect, I would observe, that I
 claim as my invention the above-described novel arrangement of
 mechanism for stopping the loom whenever the shuttle does not
 complete its course from one shuttle-box to the other, by discon-
 necting the main driving-pulley from the driving-shaft; and also
 the method of bringing a break into connection with the fly-wheel,
 for the purpose of preventing the lathe or slay from ‘beating up’
 any further, and injuring the cloth by the shuttle stopping in the
 shed, or between the warp threads.”

It was proved, that in power-loom weaving it sometimes happened
 that the shuttle failed to travel from one box to the other, in which
 case it became important to stop the action of the machine. In
 the original power-loom, when the shuttle was absent from the box,
 and was trapped in its course, the stop-rod finger, not being elevated,
 came in contact with a “frog” fixed to the frame of the loom, and
 arrested the progress of the slay at such a point as to prevent the
 shuttle breaking the warp threads, at the same time throwing the
 spring-lever handle out of its place, and passing the strap from the
 fast on to the loose pulley. That was attended with so violent a
 concussion as frequently to break various parts of the machinery.
 By the plaintiff’s invention, the whole of the momentum imparted
 to the slay, and consequently to the stop-rod finger, is received on
 the notch at the upper part of the vertical lever, and, by that
 means, is transmitted to the break, which, being suspended on a
 point, is brought in contact with the periphery of the fly-wheel, and
 immediately stops the machinery without the slightest shock. The
 arrangement has this peculiar property: that, the higher the
 [*317] velocity, *the intensity of the momentum increasing, the greater
 is the action of the break on the wheel. The clutch-box is a well-
 known mechanical operation for stopping and setting on the power,
 but its application as combined with the break is new. Before the
 plaintiff’s invention, breaks of various kinds had been used
 to stop the fly-wheel, but no break had been applied in
 the manner the plaintiff applied it; namely, by employing the

momentum of the slay, through the medium of the finger of the stop-rod, to put a break on the fly-wheel.

In September, 1848, the defendant obtained a patent for "certain improvements in and applicable to looms for weaving," and, amongst them, he claimed a novel arrangement of apparatus for throwing the loom out of gear when the shuttle failed to complete its course. In the defendant's apparatus the clutch-box was not used, but instead of it, the stop-rod finger acted on a sliding-piece, or loose frog; and instead of a rigid vertical lever, as in the plaintiff's machine, the defendant used an elastic horizontal lever; and, by reason of the pin travelling on an inclined plane, the break was applied on the wheel gradually, and not simultaneously. The defendant's specification relating to this part of the claim was as follows:

"My improvements consist of a certain novel construction and arrangement of apparatus, whereby the loom is thrown out of gear and its motions suspended when the shuttle fails to complete its traverse from one shuttle-box to the other, and remains in the shed while the reed is beating up. In ordinary power-loom this is effected by the contact of the 'finger' of the 'stop-rod' with the 'frog,' a rod or projection from the latter striking the 'spring handle' and traversing the driving-strap from the fast to the loose pulley, or by allowing the reed to swivel in the top rail or slay-cap, and making a spring joint in the back-board of the shuttle-race, the combined action of which *operate by the intervention of levers upon a stop-rod, and placed beneath the bed of the slay, the finger of which, when the shuttle is caught in the shed, acts upon the spring handle, and effects the stoppage of the loom. The characteristic features of this part of my invention are—that, by a simple arrangement, the advantages of the 'fast' and 'loose' reed-loom are combined; that it is suited to the manufacture of light or heavy fabrics, from the circumstance that the reed is fast or immoveable so long as the shuttle performs its duty (and is therefore equal to beat up cloth of any strength); but that, when the shuttle traps, or is caught in the shed, the reed, yielding to the pressure of the shuttle, swivels in the slay-cap, and the loom is immediately stopped, without injury to the warp or weft. The absence of the shuttle from the shuttle-box while the reed is beating up permits a small finger or detector to act upon the spring handle of the loom, and, simultaneously with the traverse of the driving-strap from the fast to the loose pulley, applies a break to the periphery of the fly-wheel. These operations are effected with a fast back-board to the

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shuttle-box, and an ordinary swell therein, which latter is acted upon by the shuttle at every prick, while the slay-sword is neither recessed or cranked, and the stop-rod fixed beneath the slay is dispensed with. As the brake levers which I make use of are elastic in their action, it will be found, that, so soon as the frog is liberated from contact with the stop-rod, or the spring handle is placed in the working position, the fly-wheel is also relieved from the pressure of the brake, and the loom is prepared to resume its operations."

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It was objected, on the part of the defendant, that the plaintiff's specification did not sufficiently state the nature of his invention; that, if the claim was for the combined action of the clutch-box and the break, there was no infringement of that combination; if the claim was for the several parts of the machinery, then, the clutch-box, being old, the *patent was too large. The learned Judge told the jury that the claim of the plaintiff was not for the principle either of stopping power-loom by means of the clutch-box, or of stopping them by means of a break upon the fly-wheel, but it was for a novel arrangement of mechanism designed for the purpose of instantly stopping the whole of the working parts of the loom whenever the shuttle stops in the shed, without such a concussion as would endanger or damage the machinery; that, if the question were whether the defendant had imitated the combined action of the clutch-box and the break, undoubtedly he had not infringed the plaintiff's patent, for he had left out the clutch-box; and his Lordship left to the jury the following questions: "Is the plaintiff's arrangement of machinery for stopping looms, by means of the action of the clutch-box in combination with the action of the break, as described by the plaintiff, new? Is it useful? Is the plaintiff's arrangement of machinery for bringing the break into connection with the fly-wheel new? Is it useful? Is the arrangement of machinery for bringing a break into connection with the fly-wheel in the machines made by the defendant the same substantially as the plaintiff's arrangement of machinery for that purpose?" The jury answered all these questions in the affirmative; whereupon his Lordship directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a verdict for him, if the Court should be of opinion that the plaintiff was not entitled to recover.

Watson, in the following Michaelmas Term, obtained a rule nisi accordingly, and also for a new trial, on the ground of misdirection; against which

Martin, Atherton, and Webster now showed cause :

First, the specification is good. * * Secondly, the defendant has infringed the plaintiff's patent. It is clear that a new combination of old mechanism, so as to produce a new effect, may be the subject of a patent, and whilst it is in force, another person cannot use any part of that combination which is new. * * *Newton v. The Grand Junction Railway Company* (1) is an express authority to show that there may be an infringement of part of a combination of old materials, that part being new and useful.

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Watson, Crompton, and Cowling, in support of the rule :

The main question depends on the construction to be put upon the specification. If the claim is for an arrangement or combination of known materials, there has been no infringement of that combination ; but if the claim is for the several parts described in the specification, then, one of those parts not being new, the patent is void. The presumption is, that the claim extends to the whole and to each part. * * *

POLLOCK, C. B. :

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The rule ought to be discharged. The question resolves itself into two points: First, whether there *is any objection to the specification: Secondly, whether the patent has been infringed. In deciding those points, we must bear in mind that the jury have found that the plaintiff's arrangement of machinery for stopping looms by means of the action of the clutch-box in combination with the action of the break, is new and is useful; also that so much of the plaintiff's arrangement of machinery as the defendant has used, namely, that for bringing a break into connection with the fly-wheel, is substantially the same as the plaintiff's arrangement of machinery for that purpose, and, in addition, is of itself new and useful. Upon those findings, and referring also to the specification, I have no difficulty in coming to the conclusion that the verdict ought to stand. Whether upon the evidence the jury were justified in so finding, it is not necessary to express an opinion, because the rule was not obtained on the ground of the verdict being against evidence. All that we have to consider is the conclusion which in point of law we ought to arrive at, with those facts so found before us.

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The point to which I shall first address myself is, whether the

(1) See *post*, p. 691 (5 Ex. 331, n.)

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specification is good. With the facts so found, I am of opinion that the specification is perfectly good. The first finding of the jury is, that the arrangement of machinery for stopping looms by means of the action of the clutch-box in combination with the action of the break, is new and useful. Then, is that sufficiently specified? It seems to me it is. The invention of the plaintiff is in one point of view single. He calls it "my invention of certain improvements in looms for weaving;" but he says the improvements apply to that class of machinery known as power-looms, and consist in "a novel arrangement of mechanism, designed for the purpose of instantly stopping the whole of the working parts of the loom whenever the shuttle stops in the shed." He then describes the way in which he does it. He says that the common mode is performed in a certain manner; and he then goes on to describe *his mode of separating the machine from the moving power by means of a clutch-box; and he associates with that a break, the effect of which he thus expresses: "Simultaneously with these two movements, the lower end of the vertical lever causes a break to be brought in contact with the fly-wheel of the loom, thus instantaneously stopping every motion of the loom without the slightest shock, at whatever speed the loom may be working." Then comes his claim; and I must say, that though at first I doubted whether the claim consisted of two parts or of one only, yet, on reading the specification with that candour and indulgence with which a specification should be read, it appears to me to consist of one only. He says, "I claim as my invention the above-described novel arrangement of mechanism;" and we must understand the expression "novel arrangement" to mean the same thing in the latter part of the specification as in the former; and it is clear that in the former it means one thing only. He says, my invention "consists in a novel arrangement of mechanism for instantly stopping the loom." Then he mentions the occasion when that would be required, viz. "whenever the shuttle does not complete its course from one shuttle-box to the other," by disconnecting the main driving-pulley from the driving-shaft; "and also," (which ought to be read "and by") the method of bringing a break into connection with the fly-wheel, for the purpose of preventing the lathe or slay from beating up any further and injuring the cloth by the shuttle stopping in the shed or between the warp threads." That being the case, the specification is free from objection.

The next point is, whether there has been any infringement of

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the patent. The argument addressed to us was, that this is a patent for a combination of old and new mechanism, and the defendant not having used the combination, there can be no infringement. But that is not so. There may be an infringement by using so much of a combination *as is material, and it would be a question for the jury whether that used was not substantially the same thing. I recollect a case in which a patent was taken out for an invention, a part of which, though supposed in the first instance to be useful, was soon found to be prejudicial, and was afterwards left out; but the patent was nevertheless sustained (1). Now, suppose that had been a mere combination of matters entirely new as a combination, but all of them old singly, I cannot help thinking that if the jury had found that the substantial parts of the combination were used, that would have been an infringement of the patent. Looking at this in the spirit with which we ought to view a patent for the purpose of deciding the rights of the parties, what is this patent for? It is for a mode by which the inventor seeks to separate the machine from the source of power, and at the same time to stop the momentum which has already accumulated, and to do that by one and the same operation: in fact, to make the machine itself do it. Whenever the occasion arises, by the shuttle remaining among the sheds, and not arriving at the shuttle-box, the machine is so constructed that one and the same operation throws it out of gear and at the same time applies a break to the fly-wheel, so as to stop the momentum. The defendant has substituted for the clutch-box the old plan of the 'frog,' and instead of separating the power and the machine by a clutch-box, and so throwing the machine out of gear, he has followed the old mode of throwing off the strap, but he has adopted the more important and substantial improvement of the break, which the jury have found is in itself an arrangement of machinery new and useful. What would have been the effect if the clutch-box had been entirely new, and the plaintiff had complained of its use only, we are not now called upon to say; but I think it may be laid down as a general proposition, *(if a general proposition can be laid on a subject applicable to such a variety of matters as patent law,—matters, indeed, incommensurable with each other, for the same doctrine which would apply to a medicine would scarcely apply to a new material or a new metal,) that if a portion of a patent for a new arrangement of machinery is in itself new and useful, and another

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(1) Probably *Lewis v. Marling*, 34 B. R. 313 (4 Car. & P. 52; 10 B. & C. 22.)

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person, for the purpose of producing the same effect, uses that portion of the arrangement, and substitutes, for the other matters combined with it, another mechanical equivalent, that would be an infringement of the patent. Such is the case in the present instance. It appears to me, with reference to the facts found by the jury, that the specification is good, and that the defendant has infringed the patent.

ROLFE, B. :

I am also of opinion that the rule ought to be discharged. The first question is, what is the construction of the specification; because when that is once ascertained, the rest follows as of course. In my opinion, what the patentee claims is a matter entirely new, subject to a qualification which I shall presently mention. I come to that conclusion on reading the specification as a person of ordinary understanding would do, not loosely conjecturing anything, but, at the same time, not scanning it as if it were a special plea. I must farther say, that in my experience I never saw a fairer specification, or one more calculated fully and clearly to express what the invention is. The plaintiff begins by saying, that his improvements "consist in a novel arrangement of mechanism, designed for the purpose of instantly stopping the whole of the working parts of the loom whenever the shuttle stops in the shed." It is well known, that, in working the power-loom, it occasionally happens that the shuttle gets entangled in the warp, and if the machine be not instantly stopped, the whole fabric is liable to be damaged. The plaintiff then proceeds to tell in what mode that has hitherto been

[*327] *effected; and for this purpose it is not necessary to consider whether he has in point of fact correctly stated the mode, but in construing what his improvements are, we must consider them with reference to that which he describes as the present mode, and which he says is this. (His Lordship read that part of the specification.) In plain language, formerly there was such a contrivance of machinery, that whenever the shuttle got entangled, in an instant, a certain part of the machine, which he calls the "finger," struck against a thing called the "frog," which was fixed to the frame-work of the machine, the effect of which was to throw the work out of gear, by throwing the strap off the fast pulley on to the loose pulley. Having thus stated what he considered the old mode, he next states what he conceives to be the defects of that mode. (His Lordship read that portion of the specification.) Then, having stated that his object is to introduce some improvements

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which shall have the same effect of stopping the machine, but without the violent shock, he says the mode he proposes is this. (His Lordship read that part of the specification.) That is to say, whereas heretofore the strap has been thrown off by the finger striking against the frame-work, and by a certain apparatus which shifted it from the fast pulley on to the loose pulley, now I contrive to avoid that shock, by making the finger strike on a vertical lever vibrating on a pin or stud, and not on a part of the frame-work; the result of which is, that by a certain arrangement, afterwards described, the strap is thrown off. I do not see that the clutch-box is claimed as an invention. He conceives that the best mode of fixing on the machinery is with a clutch-box; and in substance he says, my improvement, which mainly consists in striking the vertical lever, whether in connection with a clutch-box or not, has the effect of throwing the machine out of gear, as was done before, but without the violence of the shock. And he then adds, "Simultaneously with these two movements, the break is *brought in contact with the wheel." (His Lordship read that part of the specification.) It is wrong to suppose that in this specification the words "stopping every motion of the loom" necessarily mean the moving power. They are used very generally for "stopping the momentum which the machine has acquired." Then, what is it the plaintiff has claimed? Why, whereas formerly the mode of stopping the machine was by throwing off the strap by means which caused a violent jar, I have introduced an arrangement of machinery which shall have the same effect of throwing off the strap as before, but without that jar; and I mention a clutch-box because I consider that the best mode of fixing on the wheels; and simultaneously I introduce that which the jury have found to be a complete novelty. I check the momentum already acquired, by making the same machinery apply the break to the fly-wheel. Can anything be more clear? It seems to me wholly a new invention; except, indeed, if the plaintiff had proceeded against any person for using the clutch-box, or for throwing the strap off the pulley, he could only have succeeded by showing that they had done so by means of the vertical lever. The whole of the application of the break is a novelty; as to the other part, he does not profess it to be a novelty: on the contrary, he states exactly how it was done before, and points out what his distinctions are, and then, after having described in detail the mode of making the machinery operate, he says, "I claim as my invention," &c. (His Lordship read that

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portion of the specification.) It seems to me, therefore, that, looking at the construction of this specification, what the plaintiff claims is a new invention altogether, by making the stoppage consist in the striking of a finger (nearly, but not quite, in the same position as in the old machine), not against the frame-work, but against a lever arranged in the mode which he has detailed in that part of the specification which I have referred to, and which has the same effect that the former *machine had, of throwing the strap off, whether there be a clutch-box or not; and then there is introduced a new element altogether, namely, a break, which at the same time that the machinery is put out of gear, has the effect of stopping the fly-wheel. That is the construction of the specification. Then I think, that when the complaint is, that the infringement has been of that which is found to be entirely new, the learned Judge was perfectly right in his direction to the jury. The question was not whether there had been any infringement of the combined action of the clutch-box and the break, but whether the defendant imitated that one thing, namely, the application of the break to the fly-wheel through the momentum of the slay. For that reason, there having been no misdirection, there can be no new trial, and the specification being good, the rule must be discharged.

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PLATT, B. :

I am of the same opinion. Until the year 1845 there was no means of stopping the power-loom when the shuttle failed to perform its course, without causing a violent shock. The plaintiff applied his ingenuity to the subject, and elaborated a mechanical contrivance for stopping the loom instantaneously, and without any shock. That is effected by a combination of machinery which the jury have found to be new and useful, and by which at the same moment the loom is put out of gear and the fly-wheel is instantaneously stopped by a pressure equivalent to the velocity of the machine at the time; because we all know that the momentum of the machine depends on the quantity of matter multiplied into the velocity, and the quantity of matter being always the same, of course the pressure would be in proportion to the velocity of the machine. The counteracting force which would be used for destroying its momentum, would always be in proportion, and therefore it would create an absolute stability,—or rather, it would produce actual quiet; because two forces *of the same amount, opposed to each other in opposite directions, destroy each other. Certainly a

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most ingenious invention. Then the next question is, whether the plaintiff, having made this invention, has properly described it in his specification. He first points out the object of his improvements, namely, "instantly stopping" the whole of the working parts of the loom whenever the shuttle stops in the shed. Then, after giving an account of the mode in which looms were stopped up to that time, he states the manner in which he proposes to do it; and then he concludes by stating that, simultaneously with these two movements, the break is brought in contact with the fly-wheel. Surely any one who reads that specification must understand what the object of the invention was; and the mode by which it is to be effected is most minutely described. Then what does the plaintiff claim? He says, "I claim as my invention the above-described novel arrangement of mechanism." What for? "For stopping the loom whenever the shuttle does not complete its course from one box to the other." Then he shows how that is done: "by disconnecting the main driving-pulley from the driving-shaft; and also by the method"—which the context requires to be read, "and by the method of bringing a break into connection with the fly-wheel, for the purpose of preventing the lathe or slay from beating up any further," &c. Therefore, it seems to me that the specification most distinctly describes the invention; and the jury having found that it is new and useful, and that the act of the defendant was substantially an infringement of it, the rule ought to be discharged.

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Rule discharged.

NEWTON v. THE GRAND JUNCTION RAILWAY COMPANY (1).

(5 Ex. 331, n.—335, n.; S. C. 20 L. J. Ex. 427, n.)

Where a patent is granted for a combination of several things, some of which are old and some new, the question of novelty depends upon whether that which is claimed in the specification as a whole is new.

And a person who, by some chemical or mechanical equivalent, imitates a part of such combination which is new and useful, is guilty of an infringement of the patent.

CASE for the infringement of a patent for "certain improvements in the construction of boxes for axles or axletrees of locomotive engines and carriages, and for the bearings or journals of machinery in general." Pleas (*inter alia*), Not guilty; that the invention was not new; and that no sufficient specification was inrolled.

(1) Cited in *Clark v. Adie* (1875) L. R. 10 Ch. 667, 673; S. C. 2 App. Cas. 423, 46 L. J. Ch. 598.—J. G. P.

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At the trial, before Cresswell, J., at the Liverpool Summer Assizes, 1845, it appeared that the patent in question was granted to the plaintiff in May, 1843, and that the specification (so far as material) was as follows: "This invention consists of certain improvements in the manner of making or constructing the boxes within which the gudgeons or journals of machinery of various kinds, and particularly the axles of railroad cars, of locomotive engines, and of other cars and carriages are to run; and those improvements are applicable not only to boxes for axles or gudgeons, which are divided so as to form semi-cylinders, but also to boxes, bearings, or sockets that are not divided, and which form a continuous circle, and also to sockets which are square, or of any other desired form, and within which a rod or bar is to slide, as, for example, the guide-rods used in locomotive and other steam engines. The boxes in which the gudgeons or axles are to run are to be formed and prepared in the ordinary way of those which are to be received into the housings or plummer-blocks of locomotive engines, cars, and other machinery, they being made of brass, bell metal, or any other metal or metallic compound which has sufficient strength and is capable of receiving a coating of tin. The inner parts of these boxes are to be lined with any of the harder kinds of metallic compounds or alloys, known under the names of britannia metal or pewter, and of which compounds or alloys block tin is the basis. An excellent compound or alloy for this purpose may be prepared by taking about fifty parts of tin, five of antimony, and one of copper; but other compounds or alloys analogous in character may be used. To prepare the boxes for this composition, they are to be cast with projecting rims or fillets along their interior edges, and on their ends within their semi-cylindrical parts, or on the ends only of the boxes or sockets when they are not divided. The interior of these boxes, and the ledges, fillets, or rims above named are then to be cleaned and tinned in the usual way of performing that operation. A cylindrical or semi-cylindrical core of the exact size (in its cylindrical part) of the gudgeon or axle which is to run within the bearing, or of such shape and dimensions as may be necessary for the sockets of a slide, or of the stem of a valve, is then to be taken, and upon such core the box to be lined is to be placed in such manner as that the core shall coincide within the situation that the axle or gudgeon, slide or stem is to occupy within such box when in use. The boxes are to be of such size as that, when the core is so placed, it shall not touch, but shall be nearly in

contact *with the projecting rims or fillets; its distance therefrom may be about the thirty-second part of an inch, more or less. The ends of the boxes are then to be closed by any suitable means; so that the interior shall form a mould to receive the lining of composition, metal, or alloy, which is to be fused and poured into it, a proper aperture being prepared for that purpose. This aperture, in the boxes for railroad cars and locomotive engines, may consist of a hole an inch or more in diameter, left through their middles in the act of casting them, and in all cases the opening may be so proportioned as to suit the size of the box that is to be lined. The metallic composition, when melted and poured into the box, which has been prepared by being tinned, will unite firmly with its interior, and will cover the edges of the rims or fillets, so as to prevent contact between them and the gudgeons, axle, slides, or stems, which they are to receive, whilst the ledges will, at the same time, effectually prevent any tendency in the composition, metal, or alloy to spread from the weight or friction of the load, or the motion of a slide or stem. In boxes thus prepared, the heating and abrasion, which are so apt to occur in boxes so ordinarily constructed, do not take place, and their durability is consequently increased. By the employment of the metallic alloy in sheaves, and other articles of this description, and the substitution of a hard compound metal of copper and tin for the iron boxes and for the iron pins or axles upon which the sheaves are to run, the injurious consequences frequently resulting from the oxidation of the iron are obviated, such sheaves always turning freely on their pins or axles, whilst, when made of iron, they are often obstructed, and sometimes set fast, from the cause above named. I claim as the invention, making or constructing the boxes within which the journals or axles of machinery are to run, or within which the rods of slides, or the stems of valves, and other analogous parts of machinery are to slide, by providing them with rims or fillets along their edges and at their ends, or at their ends only, according to the nature and form of the box, in the manner and for the purpose herein set forth; and lining such boxes, prepared in such or a similar manner, with a metallic composition or alloy, of which tin is the basis, for the purpose herein fully made known and described. Instead of employing rims or fillets for the purpose of holding or retaining the metallic compound or alloy, other methods, such as knobs, projections, or holes may be adopted. I do not therefore intend to confine myself to the precise manner in which the

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invention is carried into effect; it is evident that the mode may be varied without departing from the nature of the invention."

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Formerly, the boxes in which the axle-trees of locomotive engines ran were made of hard metal, chiefly brass, and consequently heating and abrasion existed to a great degree. That was obviated by the plaintiff's invention. The defendants, after the date of the patent, made boxes with a lining of tin for their locomotive engines; they *did not, however, make their boxes with rims or fillets, or any equivalent, nor did they use any alloy, but in the middle of the box, while the brass was hot, they rubbed a stick of tin, working it, not by a mould, but by a soldering-iron, so that it was thick in the middle and fined off to the edges. The learned Judge told the jury, that they must take the whole of that for which the patent was granted, including the fillets within the outer case, as well as the lining with tin and the soft metal, and say whether the invention was new. Also, that if a patent was granted for a new combination of several things known before, that did not prevent any one from using those parts which were old. That it was for the jury to say, whether the part here used by the defendants was substantially the same thing as the plaintiff's invention. They having found a verdict for the plaintiff, in the following Michaelmas Term a rule *nisi* was obtained to set aside the verdict, and for a new trial, on the ground (amongst others) of misdirection, against which,

Baines, Martin, Adolphus, and Webster, showed cause (1),
(Jan. 29, 1846):

With respect to the question of novelty, they argued, that the patent was for a combination only, and therefore the jury were properly told to take the whole of that for which the patent was granted, and say whether it was new. As to the question of infringement, they argued that the invention consisted in the application of the soft metal to the hard metal, for the purpose of lessening friction; and that the rims or fillets were not an essential part of the patent, but merely the best mode of carrying out the invention; and that, according to the principle laid down in *Heath v. Unwin* (2), if a person substituted an equivalent, whether chemical or mechanical, for a part of an invention which was new and useful, that was an infringement.

(1) Before Pollock, C. B., Alderson, B., and Rolfe, B.

(2) 67 R. R. 742 (13 M. & W. 583).

Jervis, Crompton, and Cowling, in support of the rule, argued, First, That, upon the true construction of the specification, the claim was for lining the hard metal by means of rims or fillets, or by other mechanical means, so that the alloy might adhere; and that the learned Judge ought to have left it to the jury to say whether the application of the alloy, combined with the rims and fillets, was new. Secondly, That the plaintiff's was a mechanical, and the defendants' a chemical process; and that the use of a chemical equivalent was no infringement of a mechanical mode of producing a certain effect. At all events, the learned Judge should have left it to the jury to say whether the defendants had infringed the combination.

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POLLOCK, C. B.:

The rule ought to be discharged. The criterion to be applied on inquiring whether the subject-matter of a patent is novel, *is to look at the whole specification, and see what is there claimed. Now, referring to the language of this specification, it appears to me, that in substance what the patentee claims is the lining of these boxes with an alloy of tin, having certain provisions, partly mechanical and partly chemical, for keeping the lining in its place. That the mode adopted by the plaintiff is partly chemical, it is impossible to doubt, because he first tins the inside before the alloy is introduced; and the evidence was, that by means of that tinning, the alloy is made to unite with the hard metal, which it would not otherwise do. Therefore, I think the jury were correctly told that they were to consider whether the invention was new as a whole,—not whether it was new as to every part; because in modern times that is a novelty very rarely met with: the more general subject of a patent now is, some new combination or new application.

[*334, n.]

With respect to the question of infringement, it appears to me that the direction of the learned Judge was perfectly correct. If a Judge, when a patent case is before him, is to read a lecture on the natural philosophy which belongs to the patent, and to be strictly correct in every remark he makes, I am afraid that few verdicts in patent cases would stand. No doubt he is to construe the specification, and tell the jury what the patent is for; but it is for them to say whether the facts brought before them do or do not amount to an infringement. It was argued, that the same criterion is to be applied to the question of infringement as to that of novelty. But that is not so. In order to ascertain the novelty, you take the

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entire invention, and if, in all its parts combined together, it answers the purpose by the introduction of any new matter, by any new combination, or by a new application, it is a novelty entitled to a patent. But in considering the question of infringement, all that is to be looked at is, whether the defendant has pirated a part of that to which the patent applies; and if he has used that part for the purposes for which the patentee adapted his invention, and for which he has taken out his patent, and the jury are of opinion that the difference is merely colourable, it is an infringement. For these reasons it appears to me that there was no misdirection.

ALDERSON, B.:

I am of the same opinion. In considering whether the invention is new, the proper mode is to take the specification altogether, and see whether the matter claimed as a whole is new. Now, the whole which may be new as claimed, may consist in some degree of old parts, and in some degree of new parts. The question of novelty, however, will depend on whether the whole taken together is new, though it may in part consist of old parts, provided the patentee does not claim the old parts, but only the combination of them and the new. If that be so, the learned Judge was perfectly correct in telling the jury that they were to take the whole of the specification into their consideration, for the purpose of determining whether the invention was a novelty.

[385, n.]

Then, as to the infringement. There, undoubtedly, the question is altogether altered, because, where the invention consists partly of what is old and partly of what is new, the combination is the subject of the patent. Therefore, a person cannot infringe that part of the patent which is old, because the public cannot be prevented from using that which they had before used in that state. If the invention consists of something new, and a combination of that with what is old, then, if an individual takes for his own and uses that which is the new part of the patent, that is an infringement of it. The question left to the jury was, whether the part which the defendants had infringed was or was not a new part of the invention. That raises the question, whether the soft metallic lining, as applied to these boxes, was or was not a new invention. If the defendants had shown that that part of the invention had been used before, that would have been an answer to the infringement, even though it might not have been a sufficient answer to the question of novelty; but, in my opinion, the evidence was materially in favour of the plaintiff.

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I shall add very few observations ; indeed I should have added none, had it not been for the way in which the matter was pressed by the defendant's counsel, as if, in construing the specification, the invention consisted of the rims or fillets, and the rest was a mere adjunct. They discussed and scanned the language of the specification in the same sort of spirit as if it were a plea or replication specially demurred to. That is not the spirit in which a specification should be inspected. The proper mode is to construe it, and see what is the good sense of it, and whether that which the patentee claims as his invention is there distinctly and clearly explained. It is true that here the plaintiff begins by describing the form of the boxes in which this lining is to be introduced ; but, on looking to the whole specification, it is evident that what he means by " improved boxes " is boxes having a lining of soft metal, that lining being held in its place in the best manner, which he points out. The learned Judge told the jury, that, in order to find the infringement, they must find that some part of the patent (which means some material part, and which was new), had been used by the defendants. There was no evidence of the defendants having used anything but the lining of alloy ; therefore, when the jury found infringement, of necessity they found that it was a new invention.

Rule discharged.

HUTCHINSON v. THE YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY (1).

(5 Ex. 343—353 ; S. C. 19 L. J. Ex. 296 ; 14 Jur. 837 ; 6 Rail. Cas. 580.)

1849.
Dec. 7.
1850.
May 22.

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A master is not responsible to his servant for injury occasioned by the negligence of a fellow-servant in the course of their common employment, provided the latter be a person of competent care and skill (2).

Therefore, where a servant of a Railway Company, in discharge of his duty as such, was proceeding in a train under the guidance of others of their servants, through whose negligence a collision took place, and he was killed : Held, that his representative could not maintain an action against the Company under Lord Campbell's Act, 9 & 10 Vict. c. 93 ; and that it made no difference in this respect whether the accident was occasioned by the negligence of the servants guiding the train in which the deceased was, or of those guiding the other train, or of both.

A declaration in an action under Lord Campbell's Act, stated that H. was in the employ and service of the defendants, and that, in the discharge of his duty as such servant, he became a passenger in a railway carriage

(1) Cited in *The Petrel* [1893] P. 320, 324. (1866) L. R. 1 C. P. 291, 296, per ERLE, Ch. J., and *Farwell v. Boston and Worcester Railroad Corporation*, 4 Met. 49.

(2) See *Tunney v. Midland Rail. Co.*

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of the defendants, drawn by a steam-engine under the guidance of the defendants, to wit, by their servants; that the defendants were possessed of another steam-engine, which then was drawing other railway carriages, and which was under the guidance of the defendants, to wit, by their servants; yet the defendants conducted themselves so negligently in and about the guidance of the first-mentioned engine and carriage, and also in and about the guidance of the other engine and carriages, that a collision took place, and H. was thereby killed. Plea, that the collision took place solely through the negligence of the servants of the defendants; and that the engines and carriage, at the time when &c., were respectively under the guidance of the servants of the defendants, who were fit and competent persons to have the guidance of the same; and that the negligence was wholly unauthorised by the defendants, and without their leave, licence, or knowledge: Held, on special demurrer, that the plea did not amount to the general issue.

CASE upon the statute 9 & 10 Vict. c. 93. The declaration stated, that whereas before and at the time of the committing of the grievances hereinafter mentioned, and in the lifetime of Joseph Hutchinson, the said Joseph Hutchinson was in the employ and service of the defendants; and while in such service and employ, the said Joseph Hutchinson, at the request of the defendants, and in the discharge of his duty as their servant, became and was a passenger in a certain railway carriage of the defendants, in and upon a certain railway of which the defendants were then possessed, to go in and by the said railway carriage from a certain place, to wit, Viego Bank Foot, to a certain other place, to wit, South Shields, which said railway carriage then was drawn in and upon the said railway by a certain locomotive steam-engine, and the said steam-engine and railway carriage then were under the guidance, government, and direction of the defendants, to wit, by certain then servants of the defendants in that behalf. And whereas also, before and at the time of the committing of the grievances hereinafter mentioned, and in the lifetime of the said Joseph Hutchinson, the defendants were possessed of a certain other locomotive *steam-engine, which was then drawing divers, to wit, ten other railway carriages, in and upon the said railway, and the said last-mentioned locomotive steam-engine and railway carriages then were under the guidance, government, and direction of the defendants, to wit, by certain then servants of the defendants in that behalf; yet the defendants, well knowing the premises, heretofore and in the lifetime of the said Joseph Hutchinson, and after the passing of a certain Act of Parliament made and passed in the session of Parliament holden in the ninth and tenth years of the reign of her Majesty Queen Victoria, “ for compensating the families

of persons killed by accidents," to wit, on &c., behaved and conducted themselves in so negligent, careless, unskilful, and improper manner in and about the guidance, government, and direction of the said first-mentioned locomotive steam-engine and railway carriage in which the said Joseph Hutchinson was such passenger as aforesaid, and also in and about the guidance, government, and direction of the said other locomotive steam-engine, and of the said other railway carriages hereinbefore mentioned, that by and through the carelessness, negligence, unskilfulness, and default of the defendants and their servants in that behalf, and for want of due care and attention, the said last-mentioned locomotive steam-engine so drawing the said last-mentioned railway carriages as aforesaid, to wit, on &c., was violently driven upon and against and came into collision with the said railway carriage in which the said Joseph Hutchinson was such passenger as aforesaid, by means whereof the said Joseph Hutchinson then was greatly cut, crushed, and wounded, and of the said cuts, crushes, and wounds died, leaving him surviving the plaintiff, who before and at the time of his death was his wife, and Ralph Hutchinson, Elizabeth Hutchinson, &c., who before and at the time of his death were his children, to the damage of the plaintiff as such administratrix, &c.; and thereupon the plaintiff, as such administratrix, *and for the benefit of herself and of the said children of the said Joseph Hutchinson, according to the provisions of the said statute, brings her suit, &c.

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Plea, that, at the said time when &c., the locomotive steam-engine in the declaration secondly mentioned was driven upon and against and came in collision with the said railway carriage in which the said Joseph Hutchinson was such passenger as in the declaration mentioned, in manner and form as in the declaration is alleged, solely by and through the carelessness, negligence, unskilfulness, and default of the said servants of the defendants in the declaration in that behalf mentioned, and for want of due care and attention by them, and not by or through any other negligence, unskilfulness, default, or want of due care and attention; and that the said engines and carriages in the declaration in that behalf mentioned, at the said time when &c., were respectively under the guidance, government, and direction of the said several servants of the defendants in the declaration mentioned, and of no other person or persons; and that the said several servants were then severally fit and competent persons to have the guidance, government, and

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direction of such engines and carriages as aforesaid respectively, as he the said Joseph Hutchinson at the said time when &c. well knew. And the defendants further say, that the said carelessness, negligence, unskillfulness and default, and want of due care and attention of the said servants of the defendants in the declaration in that behalf mentioned, at the said time when &c., and always, were wholly unauthorised by the defendants, and were entirely without the leave or licence, knowledge, sanction, or consent of the defendants. Verification.

Special demurrer, assigning for causes that the plea is an argumentative denial of the cause of action, and amounts to the general issue. Joinder therein.

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Hugh Hill argued in support of the demurrer in last Michaelmas vacation (Dec. 7) :

The first question is, whether the declaration is good. It may be conceded, that, unless the intestate could have sued, his administratrix cannot maintain this action. It is important, in the first instance, to ascertain what is the true principle of law where a servant has met with injury through the negligence of another servant of the same employer. The only reported case bearing on the point is that of *Priestley v. Fowler* (1). There the declaration stated, that the plaintiff was a servant of the defendant in his trade of a butcher; that the defendant had desired and directed the plaintiff, so being his servant, to go with and take certain goods of the defendant in a certain van of the defendant's then used by him, and conducted by another of his servants, in carrying goods for hire upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding and being carried and conveyed by the said van with the said goods; and it became the defendant's duty to use proper care that the van should be in a proper state of repair and should not be overloaded, and that the plaintiff should be safely and securely carried thereby; nevertheless, that the defendant did not use proper care that the van should not be overloaded or that the plaintiff should be safely or securely carried; in consequence of the neglect of which duties, the van broke down, and the plaintiff was thrown to the ground and his thigh fractured; and it was held, on motion in arrest of judgment, that the action was not maintainable. That case, however, depends on this principle, that, where the common

(1) 49 R. R. 495 (3 M. & W. 1).

prudence and caution of man are sufficient to guard him, the law will not protect him in his negligence: 2 Smith's Lead. Cas. 69. Many of the instances there put as illustrations by Lord ABINGER, were not cases *of master and servant.

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(PARKE, B., referred to *Wigmore v. Jay* (1).)

It may be, that where the damage is necessarily incident to the employment, the servant cannot maintain an action against his master for an injury arising out of it; but why should a servant be without remedy in cases where a stranger may sue? The declaration shows that no care or foresight of the deceased would have protected him. There was no personal negligence on his part. He had nothing to do with the guidance or management of the trains. If a servant is sent on an errand, and, while crossing the road, his master's carriage is, through the negligence of the coachman, driven over him, is he to be without remedy because he serves the same master? Or suppose a railway clerk is injured, while crossing the line in the performance of his duties as clerk. Where the injury does not result from danger so connected with the employment that the servant would be necessarily exposed to it, the master is liable. Here the deceased was a passenger in another train. The declaration alleges that the injury was caused by the negligence of the defendants, and that is admitted by the plea. It is immaterial that there was also negligence on the part of the drivers of the train in which the deceased was: *Bridge v. The Grand Junction Railway Company* (2), *Davies v. Mann* (3).

(PARKE, B., referred to *Thorogood v. Bryan* (4).)

Secondly, the plea is bad on special demurrer. It confesses but does not avoid the cause of action. * * *

J. Addison, contra :

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The plaintiff could not succeed at the trial, unless he proved that the injury was caused by the joint negligence of the persons in charge of the two trains. But the declaration is bad in substance. The reason why a passenger may maintain an action against the Company, while a servant cannot, is, that the Company have contracted with the former for his safe conveyance, while the latter, by entering into the service, virtually undertakes all ordinary risks

(1) *Post*, p. 706 (5 Ex. 354).

(2) 49 R. R. 590 (3 M. & W. 244).

(3) 62 R. R. 698 (10 M. & W. 546).

(4) 8 C. B. 115 [overruled, *Mills v. Armstrong* (1888) 13 App. Cas. 1].

HUTCHINSON incident to it. The present case is not distinguishable in principle from *Priestley v. Fowler* and *Wigmore v. Jay*. Indeed, it is difficult to see why a master should be responsible for the acts of his servants *inter se*. There is no duty or contract either expressed or implied. If a sailor were injured by the negligence of another sailor in the performance of his duty, could it be argued that the owner of the vessel was liable? Or suppose the case of two grooms riding together, and the one by his negligence injures the other. The Company might perhaps be responsible for gross negligence, if, for instance, they employed incompetent persons; but that is not the case here.

The plea does not amount to the general issue. * * *

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Hugh Hill, in reply :

If it be necessary, in order to maintain the action, to prove gross negligence on the part of the Company, the declaration must be read as averring such negligence; and if the plea be taken as alleging that the defendants used ordinary care, that is bad as an argumentative denial of gross negligence. The declaration would be supported by proof of negligence on the part of the drivers of the train in which the deceased was not. Suppose the case of a collision between two carriages coming in opposite directions, by which a person in the highway was injured, and he brought an action charging them with joint negligence, if it turned out that one only was guilty of negligence, he would, nevertheless, be entitled to recover.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B. :

This was an action under Lord Campbell's Act, brought by the plaintiff as administratrix of her deceased husband Joseph Hutchinson, to recover compensation from the defendants on the ground that he had met with his death by reason of the negligence of their servants. (His Lordship stated the pleadings.) On this record the question is, whether the defendants are liable for an injury occasioned to one of their own servants by a collision, while he was travelling in one of their carriages, in discharge of his duty as their servant, in respect of which injury they would undoubtedly have been liable, if the party injured had been a

stranger travelling as a passenger for hire. We think they are not. This case appears to us to be undistinguishable in principle from that of *Priestley v. Fowler* (1). In that case the plaintiff was *the servant of the defendant, and had sustained an injury by the defendant having over-loaded a van, in which he the plaintiff was travelling by direction of defendant in discharge of his ordinary duties. That case was fully considered, and the COURT, after a verdict for the plaintiff, arrested the judgment, on the ground that a master is not in general liable to one servant for damage resulting from the negligence of another; and some of the inconveniences, not to say absurdities, which would result from a contrary doctrine, were there pointed out. The principle upon which a master is in general liable to answer for accidents resulting from the negligence or unskilfulness of his servant, is, that the act of his servant is in truth his own act. If the master is himself driving his carriage, and from want of skill causes injury to a passer-by, he is of course responsible for that want of skill. If, instead of driving the carriage with his own hands, he employs his servant to drive it, the servant is but an instrument set in motion by the master. It was the master's will that the servant should drive, and whatever the servant does in order to give effect to his master's will may be treated by others as the act of the master: "*Qui facit per alium, facit per se.*"

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So far there is no difficulty. Equally clear is it, that though a stranger may treat the act of the servant as the act of his master, yet the servant himself, by whose negligence or want of skill the accident has occurred, cannot. And, therefore, he cannot defend himself against the claim of a third person; nor, if by his unskilfulness he is himself injured, can he claim damages from his master upon an allegation that his own negligence was, in point of law, the negligence of his master. The grounds for these distinctions are so obvious as to need no illustration.

The difficulty is as to the principle applicable to the case of several servants employed by the same master, and injury resulting to one of them from the negligence of *another. In such a case, however, we are of opinion that the master is not in general responsible, when he has selected persons of competent care and skill. Put the case of a master employing A. and B., two of his servants, to drive his cattle to market. It is admitted, that if by the unskilfulness of A. a stranger is injured, the master is

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HUTCHINSON responsible. Not so, if A. by his unskilfulness hurts himself; he cannot treat that as the want of skill of his master. Suppose, then, that by the unskilfulness of A., B. the other servant is injured while they are jointly engaged in the same service, there we think B. has no claim against the master. They have both engaged in a common service, the duties of which impose a certain risk on each of them; and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant and not of his master. He knew, when he engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow-servant; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk.

Now, applying these principles to the present case, it follows that the plaintiff has no title to recover. Hutchinson, in the discharge of his duty as one of the servants of the defendants, had put himself into one of their railway carriages under the guidance of others of their servants, and by the neglect of those other servants, while they were engaged together with him in one common service, the accident occurred. This was a risk which Hutchinson must be taken to have agreed to run when he entered into the defendants' service, and for the consequences of which, therefore, they are not responsible. The declaration, indeed, states the accident to have arisen from the combined neglect of the servants who were managing the carriages in which the deceased was travelling, and of others of their *servants who were managing the train with which the plaintiff's carriage came into collision. And *Mr. Hill* argued, that this allegation is divisible, and that, in order to sustain the declaration, it would not be necessary to prove any negligence on the part of the train in which Hutchinson was travelling; that it would be sufficient to prove negligence on the part of the other train; and so he contended that, even admitting the defendants would not be liable for any neglect on the part of those who were managing the train in one of the carriages in which Hutchinson was travelling, yet there could be no principle exempting them from liability for the acts of those who, though equally with Hutchinson servants of the defendants, were not, at the time of the accident, engaged in any common act of service with him. But we do not think there is any real distinction between the two cases. The principle is, that a servant, when he engages to serve a master,

undertakes, as between him and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both. The death of Hutchinson appears on the pleadings to have happened while he was acting in the discharge of his duties to the defendants as his master, and to have been the result of carelessness on the part of one or more other servant or servants of the same master while engaged in their service; and whether the death resulted from the mismanagement of the one train or of the other, or of both, does not affect the principle: in any case it arose from carelessness or want of skill, the risk of which the deceased had, as between himself and the defendants, agreed to run.

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It may, however, be proper with reference to this point to add, that we do not think a master is exempt from responsibility to his servant for an injury occasioned to him by the act of another servant, where the servant injured *was not, at the time of the injury, acting in the service of his master. In such a case the servant injured is substantially a stranger, and entitled to all the privileges he would have had, if he had not been a servant.

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It was contended that the plea in this case is bad on special demurrer, as being but an argumentative denial of the cause of action stated in the declaration. But we think *Mr. Addison* successfully showed this objection to be unfounded. Though we have said that a master is not in general responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant while they are acting in one common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks. The servant, when he engages to run the risks of his service, including those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care; and the object of the plea in this case is to show that the defendants had discharged this duty, the omission to discharge which might have made them responsible to the deceased. The plea, therefore, appears to us not to be open to the objection insisted on. For these reasons we are of opinion that the plaintiff has shown no ground of action, and so our judgment must be for the defendants.

Judgment for the defendants.

1850,
May 22.

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WIGMORE v. JAY (1).

(5 Ex. 354—358; S. C. 19 L. J. Ex. 300; 14 Jur. 837.)

The defendant, a master builder, having contracted to build a certain building, employed W. as a bricklayer. The scaffolding was erected under the superintendence of the defendant's foreman, the defendant not being present, and was constructed by men in the employ of the defendant, who used an unsound ledger pole, in consequence of which the scaffold broke while W. was at work upon it, and he was thrown to the ground and killed. The unsoundness of the pole had been previously pointed out to the foreman: Held, that no action could be maintained against the defendant under the 9 & 10 Vict. c. 93, there being no evidence that the foreman was an improper person to employ for that purpose.

CASE upon the statute 9 & 10 Vict. c. 93. The declaration stated, that the defendant carried on the business of a builder, and was employed in the way of his business to build a certain building, to wit, a wing to "The London University;" and thereupon, the defendant, being such builder and so employed, did construct and erect, and from thence until the giving way and breaking down of the same, kept and continued erected, a certain scaffold for the workmen and servants employed by him in the building of the said building, and of whom the said C. Wigmore was one, to carry on thereon and by means thereof the work of building the wall and other parts of the building, and for that purpose, and in the course of their employment, to be and continue upon the scaffolding with their tools, and with bricks, mortar, &c., at great heights above the ground; and thereupon it became and was the duty of the defendant to have and keep the scaffolding and every part thereof constructed of sound, safe, and sufficient materials and poles, and to take and use due and proper care and skill in that behalf, and otherwise in and about the constructing, erecting, and keeping of the scaffolding, to prevent the workmen and servants of him the defendant, while so employed upon the scaffolding at such great heights above the ground, from falling and being cast and thrown therefrom down to the ground by the giving way and breaking down of the scaffolding or any part thereof; nevertheless the defendant, not regarding his said duty, did not nor would have or keep the scaffolding constructed of sound, safe, or sufficient materials or poles, or take or use due or proper care or skill in that behalf or otherwise &c.; but, on the contrary thereof, the defendant negligently, wrongfully, and injuriously used a certain unsound and *decayed pole, he the defendant then and at all times afterwards having had notice that the same was

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(1) See cases noted on *Hutchinson v. York, &c. Ry. Co.*, p. 697, above.

unsound and decayed, to be and form a certain part of the scaffolding, to wit, one of the ledger or horizontal poles thereof, at a great height, to wit, at the height of forty-five feet above the ground; and the defendant so having notice of the premises, then negligently, wrongfully, and injuriously formed and constructed the said part of the scaffolding of such unsound and decayed pole, and negligently &c. kept and continued the said part so formed and constructed, and the same was and continued so formed and constructed, from thence until the giving way and breaking down of the same; and the defendant in that respect and otherwise took and used so little and such bad care and skill in and about the constructing, erecting, and keeping of the said part of the scaffolding, to prevent the said workmen and servants of him the defendant, while so employed upon the scaffolding, from falling and being cast and thrown from the said part thereof down to the ground, by the giving way and breaking down of the same, that C. Wigmore, then being one of the workmen and servants of the defendant, then employed by the defendant in the building of the said building, and being then in the course of his said employment on the said part of the scaffolding, to wit, the said ledger pole thereof, at such great height above ground as aforesaid, with his tools, and with bricks, mortar, &c. at work there, and carrying on then for the defendant the work of building a certain wall of the said building, by and through the said wrongful act, neglect, and default of the defendant, the said part of the said scaffolding, to wit, the ledger pole, so then being unsound and decayed, and in that respect and otherwise carelessly, improperly, and unskilfully constructed as aforesaid, did by reason thereof suddenly give way and break down, whereby the said C. Wigmore, so then being at work upon the said part of the scaffolding, at such height above the ground *as aforesaid, then with great force and violence fell from such height down to and upon the ground, and was thereby then grievously and mortally hurt, bruised, &c., insomuch that, by reason of his said hurts, bruises, &c., he the said C. Wigmore, afterwards and within twelve calendar months next before the commencement of this suit, died, &c. The declaration then stated in the usual form, that, by means of the grievances, the plaintiff and her infant children were deprived of the maintenance and support of their father. Plea, Not guilty.

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At the trial, before Pollock, C. B., at the Middlesex sittings after last Michaelmas Term, it appeared that the defendant, who was a

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master builder, had contracted to build the hall of the London University, and that the plaintiff's husband was one of the bricklayers employed by him for that purpose. The scaffold was erected under the superintendence of the defendant's foreman, the defendant not being present, and was constructed by men in the employ of the defendant, who used an unsound ledger or horizontal pole, in consequence of which the scaffold broke while the plaintiff's husband was at work upon it, and he was thrown to the ground and killed. The unsoundness of the pole had been previously pointed out to the foreman, but the deceased could not see its defect on account of some planks being laid across it. It was objected, on behalf of the defendant, that, on the authority of *Priestley v. Fowler* (1), the action would not lie. The learned Judge was of opinion, that, as the defendant had not personally attended to the erection of the scaffolding, the action could not be maintained, and he directed a verdict for the defendant.

Watson moved for a new trial, on the ground of misdirection, in the following Hilary Term (January 15):

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Priestley v. Fowler (1) has no application here; for this is not the case of an injury done to a servant by the negligence of his fellow-servant. The persons who erected the scaffold were not the fellow-labourers of the deceased, who was merely employed to work on the scaffold of the defendant. The declaration alleges that it was the duty of the defendant to construct the scaffolding with safe and sound materials.

(PARKE, B. : The question is, whether that is a substantive averment, or a mere inference of law from the preceding facts.)

If a material averment, the duty is admitted, because not traversed; but if the allegation is a mere conclusion of law, then the question arises on the record, whether that conclusion is warranted by the premises. In *Priestley v. Fowler* the duty alleged was similar to that of a common carrier; namely, that the defendant should safely and securely carry the plaintiff; and the COURT decided that no such duty arose out of the relation of master and servant. Here the duty alleged necessarily arises out of the contract for service. The notice to the defendant is similar to an averment of a *scienter*, and is admitted by the plea. Not

guilty only operates as a denial of the breach of duty or wrongful act; so that the plaintiff is entitled to the verdict, and the objection, if any, is only open on motion in arrest of judgment. (He also referred to *Hutchinson v. The York, Newcastle, and Berwick Railway Company* (1).)

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Cur. adv. vult.

POLLOCK, C. B., now said :

This case involves the same principle as that disposed of by the judgment of the COURT in the case of *Hutchinson v. The York, Newcastle, and Berwick Railway Company*. The doctrine laid down in *Priestley v. Fowler*, and affirmed in the last-mentioned case, applies to this. It appeared that the husband of the plaintiff *was a workman employed by the defendant to assist in the erection of a building; and the cause of the accident was the misconstruction of a scaffold, in consequence of which a part of it broke, and the husband of the plaintiff fell to the ground and was killed. The person who had erected the scaffold, or assisted in the erection of it, was not suggested to have been a person deficient in skill, or an improper person to be employed for that purpose; and the ground on which the rule was applied for was, that the case of one servant injured by the negligence of another, in the course of their common employment, was not a case in which the party or his relatives were disentitled to recover damages against the master. We are of opinion, on a very full consideration of the case of *Hutchinson v. The York, Newcastle, and Berwick Railway Company*, which has been delayed for some time with a view to give the subject the fullest consideration, that no such action lies. I need not observe that, in that case, the question is on the record, and therefore may be carried to a court of error. The case of *Priestley v. Fowler* acquires additional authority from the same circumstance; for it was a case in which the COURT arrested the judgment after verdict; and it does not appear that the plaintiff's counsel thought it right, even though a verdict had been obtained, to take it to a court of error. Under these circumstances, we think there is no occasion to grant a rule in this case.

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Rule refused.

(1) *Ante*, p. 697 (5 EX. 343).

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May 31.

BRYAN v. CHILD AND FARMER (1).

(5 Ex. 368—378; S. C. 19 L. J. Ex. 264; 14 Jur. 510; 1 L. M. & P. 429.)

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The 137th section of the 12 & 13 Vict. c. 106 (2), which declares that a Judge's order, made by consent, given by a trader defendant in any personal action, unless filed as thereby required, and the judgment and execution thereon, shall be "null and void to all intents and purposes whatever," does not avoid such order, &c. as against the trader himself, but only as against his assignees if he afterwards become bankrupt.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and seizing and taking his goods.

Plea, that the defendant Farmer recovered against the plaintiff in the Court of Common Pleas a certain debt of 146*l.* 19*s.* and 2*l.* 16*s.* damages and costs; whereupon he, and the defendant Child as his attorney, sued out a writ of *feri facias*, by virtue of which the sheriff, in order to levy the said sums, seized and took in execution the goods and chattels in the declaration mentioned. Verification.

Replication, that before and at the time of the commencing and prosecuting of the said action &c., and after the passing of the Bankrupt Law Consolidation Act, 1849, the plaintiff was and from thence hitherto hath been and still is a dealer and chapman and a trader, to wit, a baker, within and subject to the laws then and still in force concerning bankrupts; that, after the commencement of the said action, a Judge's order was made by consent, that, on payment of debt and costs as between attorney and client, all further proceedings should be stayed, and, in default, judgment should be signed. That judgment was signed in pursuance of the said order, and the *feri facias* mentioned in the plea issued thereon; and that no copy of the Judge's order, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the now plaintiff, was filed with the officer acting as clerk of the doquets and judgments in the Court of Queen's Bench, at any time within twenty-one days next after the making of the said order, in like manner as a warrant of attorney in any personal action, and a *cognovit actionem* given by any defendant in any personal action, or copies thereof or affidavits of the execution thereof respectively might or could be filed with the said *clerk within twenty-one days after such warrant of attorney

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(1) Followed in *Gowan v. Wright* (1886) 18 Q. B. D. 201, 56 L. J. Q. B. 131.—J. G. P.

(2) Repealed by 32 & 33 Vict. c. 83,

s. 20. Compare s. 27 of the Debtors Act, 1869 (32 & 33 Vict. c. 62).—J. G. P.

or *cognovit actionem* should have been executed, or at any other time whatever, as by the statute in such case is required; whereby and by reason of the premises, the said Judge's order, judgment, and execution are null and void to all intents and purposes whatever.

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General demurrer, and joinder therein.

Martin, in support of the demurrer. * * *

Gray, *contrà* :

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Some effect must be given to the words "null and void to all intents and purposes whatever," in the 137th section of the 12 & 13 Vict. c. 106, which for the first time required Judges' orders to be filed. That section is framed upon the 3 Geo. IV. c. 39, s. 2, which declares that warrants of attorney not filed as thereby required shall be "void against the assignees." The alteration of language in the subsequent statutes shows that the Legislature intended a different result. The 137th section uses the words "any such trader," which means "any person liable as a trader to become bankrupt." That such is their meaning appears by the 65th and subsequent sections up to the 86th, in which the words "such trader" are used in that sense. In the 90th and 93rd sections the words are "any traders," and in the 99th and 100th "any persons." The 104th and 126th sections relate to persons who have been adjudicated bankrupts.

(ALDERSON, B. : The 137th section of the 12 & 13 Vict. c. 106, in express terms extends the provisions of the 3 Geo. IV. c. 39, to Judges' orders.)

That has reference only to the machinery for carrying out the purposes of the 137th section. The 136th section re-enacts in terms the provisions of the 2nd section of the 3 Geo. IV. c. 39, with respect to warrants of attorney, except that, instead of declaring that such warrants not filed within the time limited shall be void "as against the assignees," it declares that they shall be void to "all intents and purposes." If, therefore, they are still only void as against assignees, the re-enactment is useless, for that was already provided for.

(POLLOCK, C. B. : The 13 Eliz. c. 10, s. 3, declares, that ecclesiastical leases not authorised by that Act shall "be utterly

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CHILD. void and of none effect, to all intents, constructions, and purposes, any law, usages, and custom to the contrary, anywise notwithstanding;" and yet it has been held, that they are not void as against the persons who make them.)

[*373] The object in requiring these orders to be filed was, that *notice should be given whenever a trader consented to judgment.

(POLLOCK, C. B.: The preamble to this part of the statute is, "with respect to transactions with the bankrupt and executions against his property up to the time of the bankruptcy, or within a limited time previous thereto;" and that must be read as embodied in the 137th section.)

That preamble relates only to the sections under division 20, viz. the 133rd and 134th; the 136th and 137th commence with the words "Be it enacted," thus showing them to be independent enactments. The 3 Geo. IV. c. 39, has been held to apply even where the petitioning creditor's debt accrued after the twenty-one days: *Everett v. Wills* (1).

(ALDERSON, B.: Unless there is a distinction between Judges' orders and warrants of attorney, your construction of the statute cannot be correct; for the 136th section declares that warrants of attorney, not filed as thereby required, shall be deemed fraudulent as well as void; but how can they be fraudulent as against the trader himself? It must mean as against his creditors.)

Martin was not called upon to reply.

POLLOCK, C. B.:

The question is, whether, under the 12 & 13 Vict. c. 106, s. 137, when a trader has consented to a Judge's order to enter up judgment, and judgment has been entered up, and execution issued thereon, but the order is not filed in pursuance of that section, the trader is at liberty, without reference to any proceedings in bankruptcy, to turn round and say that the judgment and execution is void, and that his creditor is a trespasser. The difficulty in coming to such a conclusion is not in any view inconsiderable, and, moreover, is increased by the 136th section, which, as pointed out by my brother ALDERSON, enacts, that all warrants of attorney and *cognovits* not *filed as thereby required shall be

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(1) 2 Man. & G. 269; S. C. 2 Scott, N. R. 525.

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deemed fraudulent, as well as null and void. In the present case, to treat the document as fraudulent against the party himself, who has signed it with full knowledge of its effect,—a document too by which he does a mere act of justice by allowing his creditor to issue execution, and that without being himself put to the costs of a suit,—would be so absurd, that, unless we have the positive expression of the Legislature that such was meant to be the case, it is impossible for us to assume any such intention. That, however, is the proposition contended for on the one side. On the other, the question is, whether the 137th section may not be construed differently, by reference to the mode recently introduced in statutes, namely, by having certain clauses connected by a sort of preamble to each separate class of clauses, which preamble may really operate as part of the statute. The question then is, whether the introductory preamble to that set of clauses, beginning with the 133rd section, and terminating with the 138th, is to be read as incorporated with each of those sections. In my opinion it must, in order to ascertain what the meaning of the Legislature was; and so reading the statute, there is no difficulty in construing it. The introductory expression of the legislative intention or preamble is this: “And with respect to transactions with the bankrupt, and executions against his property up to the time of the bankruptcy or within a limited period previously thereto, be it enacted.” Then the 133rd section up to the 138th are all included under that general heading, so that we must read the 137th section, looking back to this preamble, and reading it in that way it would stand thus: “Be it enacted, that every Judge’s order made by consent given after the commencement of this Act, by any such trader” &c.,—not “by any trader,” words which surely must mean a trader who shall afterwards become bankrupt, and cannot be construed to apply to any trader, whether he shall become bankrupt or not. *In the course of the argument, it was intimated by the Court, that, even without the preamble, the words “null and void to all intents and purposes” would not necessarily make this document null and void as against the trader himself; and the case of ecclesiastical leases was referred to. I do not found my judgment in any degree on the decisions with respect to ecclesiastical leases, but purely upon the construction of this statute taken altogether. I am of opinion that we must read the 137th section with the preamble, and so reading it, this Judge’s order, with the judgment and execution on it, are not null and void to all intents and purposes, the

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party who consented to that order not having become bankrupt, nor, so far as we know, liable to the bankrupt law.

ALDERSON, B. :

I am of the same opinion. On looking to the words of the statute, there appears to me no necessity for arriving at the grievous absurdity of allowing a person to set aside his own deliberate act. The contest here is, that a person, who may be a perfectly solvent trader, may set aside the order of a Judge made by consent, after judgment signed and execution issued, simply because that order has not been filed as required by the statute. That would be a grievous absurdity. No doubt, if the Act compels us, we must come to that conclusion ; but I do not think it does. The provision in question is found in that part of the Act which relates to proceedings with bankrupts alone, and must be read with the light thrown on it by the preamble, it being one of the clauses within the ambit of that preamble ; and so reading it, it has reference only to such trader being bankrupt, or subsequently becoming bankrupt.

ROLFE, B. :

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I am also of opinion that this section must be read in connection with the preamble referred to ; and *I think that the construction of the statute also requires it to be read in connection with the preamble to the 125th section, “with respect to the power of the Court over certain descriptions of property.” That the section must be read in connection with the former preamble is plain from merely following the grammar ; for after the words “it is enacted,” comes the 133rd section, and then the 134th begins without the words “be it enacted,” and must therefore be connected with what went before, otherwise there is no sense. It is true that the same observation does not apply to the 136th and 137th sections, for they do begin, “be it enacted ;” but that is a mere difference of style ; and these sections being *in pari materia* with the former, must be read in the same way. But independently of that, I should be prepared to say, on authority as well as principle, looking at the object of the Act as deduced from the statute itself, that we must confine the 137th section as operating in favour of creditors only, and not construe it as affecting the rights of persons claiming under traders who have given such instruments. My Lord has adverted to the statutes of Elizabeth respecting ecclesiastical leases. Nothing can be stronger than

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the words used in those statutes, which declare that leases not authorised by them "shall be utterly void and of none effect, to all intents, constructions, and purposes, any law, usage, or custom to the contrary notwithstanding." Still the Courts early said, that such leases were not meant to be null and void as against the lessors; that the statute was made for the benefit of their successors; and that the leases were only void as against them. Now the 3 Geo. IV. c. 39, upon which the 137th section of the 12 & 13 Vict. c. 106, is founded, has given rise to discussions of a like nature with the present. (His Lordship read the title and preamble, and the 1st, 2nd, 3rd, and 4th sections of the 3 Geo. IV. c. 39.) The first case after that statute was *Morris v. Mellin* (1), * in which the question was, whether the assignee of an insolvent could insist on setting aside as void a judgment founded on a warrant of attorney subject to a defeasance, not written on the same paper as the instrument itself. A majority of the Court of King's Bench, consisting of Lord TENTERDEN, Ch. J., BAYLEY, J., and LITLEDALE, J., held, that the statute did not affect such a warrant of attorney as against the assignees of an insolvent, and that the 4th section must be read in conjunction with the 2nd, and construed to apply only to assignees of a bankrupt. HOLROYD, J., dissented, and, I must own, with great appearance of justice, because in that statute there is something which does not occur in this, namely, a marked distinction in the wording of the sections. There, if the document was not filed within a certain time, it was declared to be void "as against assignees," but if the defeasance was not on it before it was filed, it was declared to be void "to all intents and purposes," so that it was somewhat strange to say, that "to all intents and purposes," only meant against assignees of bankrupts; still the majority of the Court so held. Then came the case of *Bennett v. Daniel* (2), where the question arose, whether a warrant of attorney, on which there was no proper defeasance, could be set aside at the instance of the party who had executed it. The majority of the Court held that it could not. PARKE, J., dissented, adopting the view taken by HOLROYD, J., in the previous case, but expressly saying, that if he had found in the statute that it was meant only for the protection of the assignees of bankrupts, he should have concurred. In the subsequent case of *Davis v. Eyton* (3), TINDAL, Ch. J., treated the question as settled. Therefore, notwithstanding

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(1) 6 B. & C. 446.

(3) 33 R. R. 408 (7 Bing. 154).

(2) 10 B. & C. 500.

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there are in this statute the very strong words "null and void to all intents and purposes," yet, even if there had been no preamble, I should have been *disposed to adopt the construction consistent with good sense and the previous authorities; for, although HOLROYD, J., and PARKE, J., differed as to the application of the principle, neither disputed the principle itself.

PLATT, B. :

The object of the bankrupt law is to protect creditors, not to enable traders to repudiate their own deliberate acts. Reading the 137th section as it ought to be read, in connection with the preamble, it is evident that it relates only to such traders as shall become bankrupt. But even if the preamble is not to be considered as incorporated with the section, I should be disposed to take the same view as my brother ROLFE, and to hold, that, upon principle and authority, the operation of the 137th section is limited to assignees and creditors under a bankruptcy.

Judgment for the defendant.

1850.
May 31.
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BOWDITCH v. BALCHIN.

(5 Ex. 378—381; S. C. 19 L. J. Ex. 337.)

A police constable of the city of London has no power, under the 2 & 3 Vict. c. xciv. (1), to take a person into custody without warrant, merely on suspicion that he has committed a misdemeanor.

TRESPASS for assaulting the plaintiff, and conveying him to a police-station, and there detaining him without reasonable or probable cause.

Plea, as to assaulting the plaintiff, and conveying him to the said police-station, that, before the time when, &c., the defendant was a constable of the police of the city of London, appointed under a certain Act of Parliament made and passed &c. (2 & 3 Vict. c. xciv.); and that, at the time when &c., he was acting as such constable within the said city; and that just before the committing of the supposed trespasses, and whilst he was acting as such constable within the said city, to wit, &c., one John Miller, in the presence and hearing of the plaintiff, stated and represented to the *defendant, then acting as such constable of the police force as aforesaid, that the plaintiff had committed a certain offence, to

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(1) "An Act for Regulating the as s. 64 of the Metropolitan Police Police in the city of London," s. 8 of Act, 1839 (2 & 3 Vict. c. 47).—J. G. P. which is in nearly the same words

wit, wilful and corrupt perjury, by wilfully and corruptly making a false affidavit in a judicial proceeding before the Hon. Sir William Wightman, Knight, one of the justices of the Court of our Lady the Queen, before the Queen herself, and that the said John Miller then and there charged the plaintiff with the commission of the said offence, and then and there required the defendant Thomas Balchin to take the plaintiff into custody upon the said charge; wherefore, and because the plaintiff, on being asked by the defendant on the said occasion if his the plaintiff's name was Bowditch, replied that it was not, and that he should not tell what his name was, he the defendant then had good cause to suspect, and did then suspect, the plaintiff of having committed the said offence, and, as such constable of the police, did then, within the said city, take the plaintiff into custody; and because there was no justice of the peace for the said city then sitting, before whom the plaintiff could be taken upon the said charge, the defendant caused the plaintiff to go in and along divers public streets and highways in the said city to a certain police-station in the said city, such station being the station-house in and for the district or division of the said city within which the plaintiff was so taken into custody as aforesaid, and did then deliver him to one J. Fosberry, being the constable of the said police force in charge of the station, doing no unnecessary damage, &c., *quæ sunt eadem*. Verification.

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Demurrer, and joinder therein (1).

J. Brown, in support of the demurrer :

The substantial question raised by this demurrer is, whether a police constable *of the city of London can take a person into custody on suspicion of perjury. That depends upon the 2 & 3 Vict. c. xciv., "for regulating the police in the city of London." The 9th section confers on police constables appointed under that Act all the powers which any constables possess by the common or statute law. At common law a constable has no power to arrest a person without warrant, on suspicion of having committed a misdemeanor. The 8th section of the 2 & 3 Vict. c. xciv., upon which this plea is framed, empowers "any man belonging to the said police force to take into custody, without warrant, all loose, idle, and disorderly persons, whom he shall find disturbing the public

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(1) The plaintiff demurred specially held the plea bad in substance, it is on several grounds; but as the COURT unnecessary to advert to them.

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peace, or whom he shall have good cause to suspect of having committed or intending to commit any felony, misdemeanor, or breach of the peace, and all persons whom he shall find between sunset and the hour of eight in the forenoon lying in any highway, yard, or other place, or loitering therein, and not giving a satisfactory account of themselves." The words "loose, idle, and disorderly persons," override and control the words "whom he shall have good cause to suspect of having committed, &c. any misdemeanor." But the plea contains no averment that the plaintiff was a loose, idle, or disorderly person. The 35th section enumerates the offences for which a police constable may take a person into custody without warrant.

The Court then called on

Hugh Hill to support the plea :

Although, according to strict grammatical construction, the words, "loose, idle, and disorderly persons," might override the subsequent part of the clause, yet the plain intention of the Legislature was, that whenever a constable had good cause to suspect any person of having committed, or intending to commit, any felony, misdemeanor, or breach of the peace, he should be justified in taking such person into custody without warrant.

[*381] (ALDERSON, B. : If the Legislature had so intended, *they would have inserted the words, "and all other persons.")

POLLOCK, C. B. : Suppose a person refused to serve some public office, or had committed any breach of duty imposed by statute, would a police constable be justified in taking him into custody without a warrant ? In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.)

Per CURIAM (1) :

There must be judgment for the plaintiff.

Judgment for the plaintiff.

(1) POLLOCK, C. B., ALDERSON, B., ROLFE, B., and PLATT, B.

SANGSTER v. KAY (1).

(5 Ex. 386—388; S. C. 19 L. J. Ex. 314.)

1850.
May 23.

[386]

A clerk to the Privy Council is not a person who "carries on his business" at the office of the Privy Council, within the meaning of the 60th section of the County Courts Act, 9 & 10 Vict. c. 95 (2).

THIS was a rule calling upon the plaintiff to show cause why a suggestion should not be entered upon the roll to deprive him of costs, under the 129th section of the County Courts Act, 9 & 10 Vict. c. 95. It appeared that the plaintiff had brought his action in the superior Court, and had recovered the sum of 9*l.* 2*s.* 6*d.* only, and the defendant had obtained the rule on the ground that the plaintiff ought to have brought his action in the Westminster County Court, as the defendant was a clerk to the Privy Council, the office of which was in Whitehall.

Martin showed cause :

The main objection to this application is, that the defendant cannot be said to have carried on his business, at the time of the action brought, within the district of the county court in which the defendant contends the action should have been brought, within the true meaning of the 60th section of the 9 & 10 Vict. c. 95. That section enacts, that the summons may issue "in any district in which the defendant or one of the defendants shall dwell or carry on his business at the time of the action brought." This precise point was decided in *Buckley v. Hann* (3), which turned upon the words of the London Small Debts Act, 10 & 11 Vict. c. lxxi. The language of that Act is identical with that of the present. * * *

Hawkins, in support of the rule :

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"Business" is defined in Johnson's Dictionary to mean "employment," and the defendant may clearly be said to carry on his "employment" or business within the district of the Middlesex County Court, according to the meaning of this section of the Act. *Buckley v. Hann* is distinguishable from the present case; for there the affidavit merely stated that the defendant daily attended at the place in question.

(1) See *Graham v. Lewis* (1888) 22 Q. B. D. 1, 58 L. J. Q. B. 117; *Ex parte Breull* (1880) 16 Ch. D. 484, 50 L. J. Ch. 384.—J. G. P.

(2) See now 51 & 52 Vict. c. 43, s. 74.—J. G. P.

(3) *Ante*, p. 553 (5 Ex. 43).

SANGSTER POLLOCK, C. B. :

KAY.

I am of opinion that this rule ought to be discharged. The only substantial question in the case is, whether a person who is a clerk in the Privy Council Office is a person "carrying on his business" within the meaning of this Act of Parliament. I am of opinion that he is not. The term "business" may mean the employment or the occasional occupation of a person; but the term "carrying on business," within the meaning of this Act of Parliament, implies something more than mere service, from which the person may be discharged at a moment's notice. I therefore think that the defendant cannot be said to carry on business within the meaning of the Act.

ALDERSON, B. :

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I am of the same opinion. The defendant can neither be said to carry on any business nor to *carry on business at any fixed place. The affidavit is, therefore, not sufficient.

ROLFE, B. :

I agree with the rest of the Court in thinking that this defendant did not carry on business within the meaning of the Act. The foreman at a haberdasher's shop could not be said to carry on business there, because he attends to the shop and does what he is employed to do by his master.

Rule discharged.

1850.
May 24.

CRANSTON v. MARSHALL AND ANOTHER.

(5 Ex. 395—403 ; S. C. 19 L. J. Ex. 340.)

[395]

The plaintiff, who resided in Ireland, having applied to the defendants, emigration agents in London, respecting a passage for himself and family on board their ships to Australia, received in answer a letter in which they agreed to convey him and his family for 65*l*. This letter was written on the fly-sheet of a printed circular, headed "Emigration to Australia," and which (*inter alia*) stated that ships "will be despatched on the appointed days (wind and weather permitting), for which written guarantees will be given. Then followed a list of ships, amongst which the *Asiatic* was named as to sail from London on the 15th of August, and from Plymouth on the 25th. In another part of the circular it was stated, "Passengers from Ireland can readily join at Plymouth. A deposit of one-half the passage-money to be paid at the time the berths are engaged, the balance to be paid prior to granting the embarkation order." The plaintiff engaged a berth on board the *Asiatic*, and paid the defendants 32*l*. 10*s*. as a deposit, but no written guarantee was given. The *Asiatic* did not arrive at Plymouth until the 3rd of September, although not prevented by wind or weather.

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The plaintiff's berth was kept vacant from London to Plymouth: Held, that the statement in the circular was not a mere representation, but a warranty that the *Asiatic* would sail on the days appointed, and that, as she did not, the plaintiff was justified in taking a passage on board another vessel, and was entitled to recover from the defendants the amount of the deposit, and the expenses he had been put to by the delay at Plymouth.

ASSUMPSIT. The first count of the declaration stated, that heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendants, then paid to the defendants, a sum of money, to wit, 32*l.* 10*s.*, being a deposit of one-half the amount of the passage-money for the passage of the plaintiff and his wife and his children, to wit, &c., from Plymouth to Adelaide, in South Australia, in the inclosed steerage of a ship called the *Asiatic*, which the defendants then represented to the plaintiff would sail from London on the 15th of August, 1849, and from Plymouth on the 25th August, 1849, for Adelaide, wind and weather permitting, and then promised the defendants to pay them the further sum of 32*l.* 10*s.*, being the remainder of the passage-money, prior to the granting of an embarkation order for the plaintiff and his wife and children to embark on board the said ship, the defendants promised the plaintiff that the ship should sail from London on the 15th of August, 1849, and from Plymouth on the 25th of August, 1849, for Adelaide, wind and weather permitting, and that they would then cause the plaintiff, his wife and children, to be carried and conveyed as passengers in the inclosed steerage of the said ship from Plymouth to Adelaide. Averments, that the plaintiff and his wife and children were at Plymouth on the 25th of August, 1849, and for a reasonable time before, to wit, for *five days before, ready and willing to become passengers in, and to sail and be conveyed by the said ship, and in the inclosed steerage thereof, from Plymouth to Adelaide; and the plaintiff was, on the said 25th of August, ready and willing to pay the defendants the remainder of the passage-money, to wit, 32*l.* 10*s.* Breach, that the ship did not sail from Plymouth on the 25th of August, in the year aforesaid, although not prevented by wind or weather, nor had the ship then arrived at Plymouth. Whereby the plaintiff was put to great expense of his monies, to wit, 50*l.*, in and about providing food, lodging, &c., for himself, his wife and children, from the 25th of August, in the year aforesaid, until he obtained a passage on board of another ship, and in and about obtaining a passage on board of another ship, from Plymouth to Adelaide. There was also a count for money had and received.

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Plea, that the defendants did not promise; upon which issue was joined.

At the trial before Rolfe, B., at the London sittings in last Hilary Term, the following facts appeared: The defendants, who were ship-owners and ship-brokers residing in London, had for a series of years been engaged in sending emigrant ships to Adelaide, in South Australia. In July, 1849, the plaintiff, who resided in Ireland, having seen the defendants' advertisements of the ships about to be despatched, applied through a friend for particulars of passage-money, &c., in answer to which a letter was written by the defendants, containing the following passage: "We will agree to give the family a cabin to themselves for 65*l*." This letter was written on the fly-sheet of a printed circular, the material parts of which are as follows:

"EMIGRATION TO AUSTRALIA.

"Steerage Passage (including provisions) 15*l*. per adult.

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"With a view to enable respectable persons, who are ineligible to a free passage, to proceed to the Australian colonies *at the lowest possible cost, it has been arranged to despatch a line of superior first class ships, of large tonnage, for the especial accommodation of steerage and other passengers, at an exceedingly low rate of passage-money. These vessels will be subjected to the inspection of her Majesty's emigration officers, and will be despatched on the appointed days (wind and weather permitting), for which written guarantees will be given.

SHIPS.	Tons Burthen.	Commanders.	Ports of Destination.	TO SAIL.	
				From London.	From Plymouth.
<i>Glen Huntley</i> .	650	R. Barr . .	Adelaide and Port Philip	1st August	11th August.
<i>Asiatic</i> . . .	700	A. S. Waddell	Ditto . Ditto	15th Ditto	25th Ditto.
<i>Hooghly</i> . .	650	W. Henry .	Port Philip and Sydney	1st September	11th September.

(Then followed a description of the ships.)

"Other equally fine ships, similarly fitted &c., will succeed, sailing on the 1st and 15th of each month from London, and the 11th and 25th from Plymouth.

"Passengers from Ireland can readily join the line of ships at Plymouth at a small cost, by the Belfast, Dublin, and Cork Stear

Traders, and have every assistance rendered them on their arrival at Plymouth by Marshall and Edridge's agent there.

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(Then followed a statement as to provisions, luggage, &c.)

"All packages of baggage to be distinctly marked with the name of the passenger, and also with the words 'wanted on the voyage,' 'or not wanted on the voyage,' and must be at the dock, ready for shipment, at least three days prior to the appointed day for sailing; and if sent addressed to the care of Marshall and Edridge, passengers *need not arrive in London until the morning of that day, thus preventing any unnecessary delay here.

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"A deposit of one-half the amount of agreed passage-money to be paid at the time the berths are engaged; the balance to be paid prior to the granting of the embarkation order, and which, in all cases, must bear the signature of Marshall and Edridge.

"The berths are appropriated in rotation as the deposits are paid.

"Persons engaging accommodation for themselves or others, and not actually embarking, will be held responsible for one half of the amount of passage-money, and be required to pay the same whether they may have made a deposit or not.

"For further particulars apply to the undersigned, who are constantly despatching a succession of superior first class ships (regular traders) to each of the Australian colonies.

"MARSHALL AND EDRIDGE,
"34, Fenchurch Street, London."

After some correspondence, the plaintiff paid 32*l.* 10*s.* to the defendants, who acknowledged the receipt of it by the following letter:

"7th August, 1849.

"SIR,—We beg to acknowledge the receipt of your favour of yesterday's date, inclosing 32*l.* 10*s.*, deposit for passage of yourself, wife, and five children, per *Asiatic*, inclosed steerage.

"Our agent at Plymouth is Mr. Wilcocks, Barbican, who will afford you all needful assistance and information.

"Yours obediently,

"MARSHALL AND EDRIDGE."

The plaintiff and his family arrived at Plymouth from Ireland on the 20th of August, when, on inquiry at the office of Mr. Wilcocks, they were informed that the *Asiatic* would not sail from London until the 25th of August, *or from Plymouth until the 3rd of

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CRANSTON September. The *Asiatic* left London on the 28th of August, and
 MARSHALL. arrived at Plymouth on the 3rd of September, and sailed for
 Adelaide on the 4th. On the 31st of August, the plaintiff took a
 passage for himself and family on board another vessel called the
Constant, then lying at Plymouth, which cleared out from Plymouth
 for sailing on the 1st of September, but did not in fact sail until
 the 9th of September. No other guarantee as to the time of sailing
 had been asked for or given except the circular above mentioned.
 The berths engaged by the plaintiff were kept vacant between
 London and Plymouth.

It was objected, on behalf of the defendants, first, that the contract alleged in the declaration was not proved, inasmuch as the circular referred to a written guarantee as to the time of sailing, to be afterwards given; secondly, that the consideration had not wholly failed, because the berths were kept vacant for the plaintiff and his family from London to Plymouth. His Lordship overruled these objections, and a verdict was found for the plaintiff for 40*l.*, being 32*l.* 10*s.* for the amount of deposit, and 7*l.* 10*s.* for the expense which the plaintiff had been put to by the delay at Plymouth, leave being reserved for the defendant to move to enter a nonsuit, or to reduce the damages to 32*l.* 10*s.*

A rule *nisi* having been obtained accordingly,

Humfrey and Cleasby showed cause:

The words in the circular, "for which written guarantees will be given," do not mean that there shall be no valid contract unless written guarantees are given, but only that the defendants are ready to give them if required. Even if a written guarantee were necessary, the circular itself formed one, for the contract was based on the terms of the circular and letter written on the fly-leaf of it. This is not a contract of an ordinary kind, but one intended for the benefit of emigrants coming from a distance with their families, and it is important *that they should have some assurance that the vessel will sail at the appointed time. Consequently, time is of the essence of the contract. The deposit was paid on the terms that the vessel would sail on the precise day, "wind and weather permitting." It would be a fraud, if the defendants refused a written guarantee; so that they cannot now object that they did not give one. The stipulation in the circular, that all baggage must be at the dock three days prior to the appointed day for sailing, shows that the defendants considered the precise day of sailing

a material part of the contract. Then, with respect to the damages : no allegation of special damage was necessary. The plaintiff paid 32*l.* 10*s.*, on an undertaking by the defendants to convey him and his family from Portsmouth to Adelaide ; and the defendants having failed to do so, he is entitled to recover back that amount under the special count, or at all events, under the count for money had and received, as upon a consideration which has failed. It is said, that the consideration has not wholly failed, because the defendants have kept the berths unoccupied from London to Plymouth ; but that is immaterial, for the berths were not ready on the 25th of August.

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Martin and J. Wilde, in support of the rule :

This is not an absolute contract that the ship shall sail on the appointed days, wind and weather permitting, but a mere representation. The defendants in effect say, " We *bonâ fide* intend the vessel to proceed on certain days ; we will not, however, guarantee that by this document, but written guarantees will be given if required." The circular expressly excludes a warranty, by thus referring to a guarantee thereafter to be given.

(POLLOCK, C. B. : Was anything to be paid by the plaintiff for a written guarantee ?)

Nothing : he had the option of demanding such guarantee, and, not having done so, he cannot succeed in this action. The plaintiff was not entitled to abandon the contract, but only to recover damages *commensurate with the expense he had been put to by the non-arrival of the vessel. It was not a condition precedent, that the ship should sail at the precise time indicated : *Ritchie v. Atkinson* (1), *Davidson v. Gwynne* (2), *Constable v. Cloberie* (3). This case is distinguishable from *Glaholme v. Hays* (4), and *Olive v. Booker* (5), for in those cases the language of the charter-party was such that the statement of the time of sailing amounted to a warranty. *Yates v. Duff* (6) is an authority to show that the plaintiff cannot recover, unless either time was of the essence of the contract, or the delay in sailing was unreasonable. Besides, there has not been an entire but a partial failure of consideration only, for the berths were kept vacant until the arrival of the vessel at Plymouth.

[*401]

(1) 10 R. R. 307 (10 East, 295).

(4) 58 R. R. 399 (2 Man. & G. 257).

(2) 11 R. R. 420 (12 East, 381).

(5) 74 R. R. 696 (1 Ex. 416).

(3) Palm. 397.

(6) 5 Car. & P. 369.

CRANSTON POLLOCK, C. B. :

^{c.}
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The rule ought to be discharged. The case involves two questions. The first is, whether this document was a guarantee to sail on the day named, or a mere representation. It appears to me that the decision of that question is in reality the decision on both points. Where parties by advertisement hold out that they are ready to give a written guarantee that a vessel shall sail on a particular day, and a contract is entered into specifically on that footing, in substance that is a warranty to sail on the day named. I do not mean to say that there is not room for the argument on behalf of the defendants; but the question being, what is a reasonable construction to be put on the contract which the parties have entered into, practically it comes to this: Was the offer of a written guarantee intended as an assurance to the parties who were about to sail, or was it given merely to animate their vigilance, that they might be ready to sail on the day named? I think that the offer of the guarantee was for the assurance and safety *of the passengers, that they might calculate their means, and might not be wandering about the streets of Plymouth as mendicants, or perhaps sent back to Ireland to the workhouse. It is admitted that nothing was to be paid for a written guarantee, and that shows that the guarantee was in fact given by the advertisement and circular. Then there being a written guarantee to sail on the days named, and the contract being broken, what is the consequence? It has been argued, that the sailing on the days named was not a condition precedent; but there is a distinction between a mutual agreement containing covenants on both sides, and an absolute warranty. Where there is a warranty, it is always of the essence of the contract. The case of *Yates v. Duff* illustrates that. There there was an agreement to sail on a particular day; but that was held not to be of the essence of the contract, because there was no warranty. But here there was a guarantee, and its conditions not having been complied with, the plaintiff was entitled to enter another vessel, if not *instantly*, at all events after waiting a day or two; and though the vessel did not actually sail, he had all reasonable assurance that it would sail; and if he was entitled to do that, as I think he was, without saying at what precise period the right accrued, he is entitled to recover back the money which he paid on the faith of the contract being performed.

ALDERSON, B. :

I am of the same opinion. It seems to me that, in this case,

time was of the essence of the contract; that the contract was broken by the defendants, and, being broken, that the plaintiff had the option of rescinding it by entering another vessel, and therefore entitled to recover back his money.

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PLATT, B., concurred.

ROLFE, B. :

I am of the same opinion. I will only say, *that the difficulty made on this latter point was not exactly what has been argued now. It was that, by reserving the berths from London to Plymouth, a part of the contract was performed. That has been very little argued, and, indeed, it is not arguable; for if I contract for a berth in a vessel to take me up at Plymouth, the vessel going from France to Australia, and the vessel fails to be at Plymouth, it would be absurd for the owner to say, "I have done something which I ought to have done before I got to Plymouth."

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Rule discharged.

WASHINGTON v. YOUNG AND ANOTHER.

(5 Ex. 403—409; S. C. 19 L. J. Ex. 348.)

1850.
June 3.

[403]

Under the 5 & 6 Will. IV. c. 63, s. 21 (1), earthen vessels are liable to seizure if ordinarily used as measures, and if on examination they are found to be unjust.

TRESPASS for seizing and taking certain earthenware mugs, and jugs of the plaintiff's. Plea, Not guilty (by statute).

The cause was tried at the Bedfordshire Summer Assizes, 1849, when a verdict was found for the plaintiff, subject to the following case :

The plaintiff, before and at the time of seizure hereinafter mentioned, kept a beer shop, and sold beer to customers out of the house, and to customers to drink the beer in the house. The plaintiff used, for the supply of his customers, pewter vessels and earthen vessels, having two sizes of each sort. When an outdoor customer ordered a quart or a pint of beer, the supply was given in the pewter vessel, and when an indoor customer called for a quart or a pint of beer, the supply was furnished in a pewter or earthen vessel indifferently. The charge for the beer supplied in the larger vessel of each kind was 4d., and the charge for the supply in the smaller vessel of each kind was 2d. The pewter vessels were

(1) Repealed by the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49). See now that Act, especially s. 25.—J. G. P.

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generally called measures, and the earthen vessels were called mugs. The defendants on a certain day entered the plaintiff's house, to examine the plaintiff's measures, being duly authorised for that *purpose. The plaintiff's wife, upon being requested to produce her measures, produced the pewter vessels, which were found to be correct in their contents. The defendants, on seeing the earthen mugs upon the shelves, asked the plaintiff's wife if she refused to produce them, upon which she took them from the shelves, and placed them on the table. The defendants tested these earthen mugs by standard measures, and found some of them deficient, and seized two quarts and fourteen pints, found to be deficient upon comparison with standard measures. This action was commenced for such seizure on the 21st of April, 1849. The defendants caused an information to be laid before magistrates, to recover the penalties alleged to have become payable under the statute, by reason of the deficiency of the said earthen mugs, and a conviction was pronounced to the purport set out in the appendix (1), the legal effect *of which it is open to the plaintiff to contest upon the argument. If the Court should be of opinion that the plaintiff was entitled to recover, the verdict was to stand, otherwise the verdict was to be set aside, and a nonsuit entered.

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O'Malley, for the plaintiff:

The question turns upon the true construction of the 5 & 6

(1) The conviction set out in the appendix was as follows: "Be it remembered, that on &c., John Washington is convicted before us, Edward Orlebar Smith, clerk, and William Dodge Cooper, Esq., two of her Majesty's justices of the peace in and for the county of Bedford: For that the said John Washington, on the 19th of March, 1849, at the said parish of Taddington, in the said county of Bedford, unlawfully had in his possession, in a certain shop there, being the shop of the said John Washington, wherein goods were then kept for sale by measure, fourteen measures, purporting respectively to be pint measures, and two measures, purporting respectively to be quart measures, which said measures, so purporting respectively to be quart measures, were, upon examination thereof, duly made on the day and year last afore-

said, according to the statute in that behalf, in the said shop, by William Ralph Young, an inspector of weights and measures, duly appointed in that behalf for the district wherein the said shop is situate, and having jurisdiction in the premises, and being duly authorised in writing for that purpose, under the hand of Edward Orlebar Smith, clerk, one of her Majesty's justices of the peace in and for the said county, found to be unjust, contrary to an Act of Parliament passed in the sixth year of the reign of King William the Fourth, intituled "An Act to repeal an Act of the fourth and fifth years of his present Majesty, relating to weights and measures, and to make other provisions instead thereof. And we do adjudge that the said John Washington hath forfeited for his said offence the sum of one pound. Signed and sealed" &c.

Will. IV. c. 63 (1); and it is submitted, *that these earthen mugs were not measures liable to be seized by the defendants. The 12th

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(1) Sect. 6 enacts, "That from and after the passing of this Act, the measure called the Winchester bushel, and the lineal measure called the Scotch ell, and all local or customary measures, shall be abolished; and every person who shall sell, by any denomination of measure other than one of the Imperial measures, or some multiple or some aliquot part, such as half, the quarter, the eighth, the sixteenth, or the thirty-second parts thereof, shall on conviction be liable to a penalty not exceeding the sum of 40s. for every such sale: Provided always, that nothing herein contained shall prevent the sale of any articles in any vessel, where such vessel is not represented as containing any amount of Imperial measure, or of any fixed, local, or customary measure heretofore in use."

Sect. 12 enacts (*inter alia*), "That all measures of capacity which shall be made after the passing of this Act shall have their contents denominated, stamped, or marked on the outside of such measures in legible figures and letters."

Sect. 21 enacts (*inter alia*), "That every person who shall use any weight or measure other than those authorised by this Act, or some aliquot part thereof as hereinbefore described, or which has not been so stamped as aforesaid, except as hereinafter excepted, or which shall be found light or otherwise unjust, shall on conviction forfeit a sum not exceeding 5*l.*; and any contract, bargain, or sale made by any such weights or measures shall be wholly null and void; and every such light or unjust weight and measure so used shall on being discovered by any inspector so appointed as aforesaid, be seized, and, on conviction of the person using or possessing the same, shall be forfeited: Provided always, that nothing herein contained shall extend to require any wooden or wicker measure used in the sale of lime or other articles of the like nature,

or any glass or earthenware jug or drinking cup, though represented as containing the amount of any Imperial measure, or of any multiple thereof, to be stamped; but any person buying by any vessel represented as containing the amount of any Imperial measure, or of any multiple thereof, is hereby authorised to require the contents of such vessel to be ascertained by a comparison *with a stamped measure, such stamped measure to be found and provided by the person who shall use such wooden or wicker measure, glass jug or drinking cup as aforesaid; and in case the person who shall use such last-mentioned measure or vessel shall refuse to make such comparison, or if, upon such comparison being made, such wooden or wicker measure, glass jug or drinking cup, shall be found to be deficient in quantity, the person who shall use the same shall, on conviction, be subject to the forfeitures and penalties hereinbefore imposed on any person using light or unjust weights or measures."

Sect. 28 enacts, "That in England and Ireland it shall be lawful for every justice of the peace of any county, riding, or division, or of any city or town, and in Scotland for every sheriff, justice, or magistrate of any borough or town, or for any inspector authorised in writing under the hand of any justice of the peace in England and Ireland, or of any sheriff, justice, or magistrate in Scotland, at all seasonable times to enter any shop, store, warehouse, stall, yard, or place whatsoever within his jurisdiction, wherein goods shall be exposed or kept for sale, or shall be weighed for conveyance or carriage, and there to examine all weights, measures, steelyards, or other weighing machines, and to compare and try the same with the copies of the Imperial standard weights and measures required or authorised to be provided under this Act; and if, upon such examination, it shall appear that the said weights or measures are light

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section shows, that the measures contemplated by the statute are such as are required to have their contents stamped on the outside of them. The 21st section, however, expressly provides that nothing therein contained shall extend to require any glass or earthenware jug or drinking cup to be stamped ; but any person buying by any vessel represented as containing the Imperial measure, is authorised to require the contents to be ascertained, and if it be found unjust, the person using it is subjected to the forfeitures and penalties imposed on persons using unjust measures. The 6th section, *which imposes a penalty on persons selling by any other than the Imperial measure, excepts the case of articles sold in a vessel not represented as containing the Imperial measure. The effect of those enactments is, that where earthen vessels are used, the penalty does not attach, unless they are found unjust after a representation that they contain the proper measure. There is good reason for the distinction, since metallic vessels are capable of very nice adjustment, which earthen vessels are not. This, being a penal statute, ought to be construed strictly.

Tozer, for the defendant :

Assuming the plaintiff's construction to be correct, the vessels seized were used for the sale of beer, and consequently were represented as measures. But, under the 28th section, they were liable to seizure, whether they were used as measures or not. The case is not within the proviso of the 6th section ; for it is stated as a fact, "that when an indoor customer called for a quart or a pint of beer, the supply was furnished in a pewter or earthen vessel indifferently." Reading the 12th and 21st sections together, all vessels, except glass or earthenware jugs, are liable to be seized if unjust in their contents or not stamped ; those jugs do not require to be stamped, but may be seized if represented to contain the Imperial measure, when in fact they do not. The latter portion of the 21st section was not intended to interfere with the former, but only to give the customer a summary remedy by enabling him to insist on being supplied with the just measure. Under the Beer Act, 11 Geo. IV. & 1 Will. IV. c. 64, s. 12, none but measures sized according to the standard are allowed to be used ; therefore, these are either measures within the 5 & 6

or otherwise unjust, the same shall be liable to be seized and forfeited ; and the person or persons in whose posses-

sion the same shall be found shall on conviction forfeit a sum not exceeding 5*l.*," &c.

Will. IV. c. 63, or if not, they are illegal measures. The conviction, not having been appealed against under the 35th section, is a decision *in rem* that these were illegal measures, and that the plaintiff was liable to the penalty.

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O'Malley replied.

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POLLOCK, C. B. :

We are all of opinion that the plaintiff ought to be nonsuited. It appears to me, that the meaning of the 28th section is this: that whatever is used as a measure, if, when examined, it turns out to be unjust, is liable to be seized and forfeited. The plaintiff was in the habit of using these measures or pewters indifferently, and when the defendants came for the purpose of examination, no objection was made to the production of the earthen mugs, and they having been found unjust, it was lawful for the defendants to seize them.

ALDERSON, B. :

I am of the same opinion. The 28th section enables particular persons to enter any place whatsoever wherein goods shall be exposed for sale, "and there to examine all weights and measures." Now, we are to consider what are the weights and measures contemplated by that section. They are certainly not stamped measures only, for the language of the section is too large for that. Then let us see whether the 21st section will afford any guide. That section requires all weights and measures, except as hereinafter mentioned, to be stamped; it then goes on to provide that "nothing therein contained shall extend to require any glass or earthenware jug or drinking cup, though represented as containing the amount of any Imperial measure or of any multiple thereof, to be stamped;" and having before said that stamped measures which are found unjust shall be seized, it goes on to provide that any person who shall use such unstamped measures, if they are found to be unjust, shall on conviction be subject to the forfeitures and penalties imposed on persons using unjust measures. It has been argued that the latter part of that section is not to be construed as applying to measures within the 28th section, and I was at first struck with the argument; but, on consideration, I am of opinion *that all measures of capacity ordinarily used are to be treated as measures within the 28th section, if

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represented to contain the Imperial measure. That is found as a fact in this case, and, consequently, these vessels were liable to seizure.

ROLFE, B. :

I am of the same opinion. I agree with my brother ALDERSON, that though the case is loosely stated, it means that these earthen vessels were ordinarily represented as of a given measure.

PLATT, B., concurred.

Judgment of nonsuit.

1850.
May 30.
June 5.

BURKINSHAW v. THE BIRMINGHAM AND OXFORD JUNCTION RAILWAY COMPANY (1).

(5 Ex. 475—488 ; S. C. 20 L. J. Ex. 246 ; 6 Rail. Cas. 600.)

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The words "lands which shall have been taken for or injuriously affected by the execution of the works," in the 68th section of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), include such lands only as are actually taken or actually affected by the works.

A., the proprietor of certain houses, which were liable to be taken for making a railway, under the provisions of the local Act of the promoters of the undertaking, received a notice under the 18th section of the Lands Clauses Consolidation Act, 1845, from the promoters, that the property would be required by them for the railway, and the notice demanded the particulars of A.'s interest therein, and stated their willingness to purchase it. A. duly furnished these particulars, and a sum of 4,500*l.* was set upon the property by him, which amount he claimed from the promoters as a compensation for taking the property, and he required payment thereof, or that a warrant should be issued by the Company, to summon a jury to assess the proper amount, under the provisions of the Act. The Company took no further step in the matter : Held, that, under these circumstances, A. could not maintain an action to recover from them the 4,500*l.*

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DEBT. The declaration stated, that, before the commencement of this suit, and before the giving of the notice next hereinafter mentioned, to wit, on &c., to wit, under and by virtue of the provisions of a certain Act of Parliament, (9 & 10 Vict., Aug. 3) intitled "An Act for making *a Railway from Birmingham to join the Lines of the proposed Oxford and Rugby, and Oxford, Worcester, and Wolverhampton Railways, and to be called 'The Birmingham and Oxford Junction Railway ;'" and of a certain other Act of Parliament, (9 & 10 Vict., Aug. 3) intitled "An Act for making a Railway into Birmingham, in extension of the proposed Birmingham and Oxford Junction Railway," the defendants were incorporated, and were thereby authorised and empowered to make

(1) See *Spencer v. Metropolitan Board of Works* (1882) 22 Ch. D. 142, 173, 52 L. J. Ch. 249.—J. G. P.

and maintain a railway therein described and specified, and to execute the works necessary for the same, and to take such of the lands therein mentioned as should be necessary for the purposes of the said Acts and the works thereby authorised; and that, before the commencement of this suit, and before and at the time of the giving of the said notice, the plaintiff was seised of certain lands, that is to say, certain messuages, &c., in Birmingham, and described in the books of reference deposited with the clerk of the peace for the county of Warwick, being the plans and books mentioned and referred to in the secondly above-mentioned Act, and the said lands being lands which the said Company were authorised and empowered, by virtue of the Acts of Parliament, to take for the purposes of making and maintaining the said railway, that is to say, the Birmingham and Oxford Junction Railway. And that the plaintiff being so seised as aforesaid, the defendants, to wit, on the day and year aforesaid, required to take the said lands of the plaintiff, for the purpose of making and maintaining the said railway. And that the defendants thereupon, after the passing of the said Acts, to wit, on the 9th of January, 1847, caused a certain notice in writing to be served upon the plaintiff, whereby notice was given by the defendants to the plaintiff, that the said railway would pass through the said lands of the plaintiff, and that the defendants required to purchase and take the same, for the purposes of the said railway, and that the defendants were willing to treat for the purchase thereof, *and of all estates and interest therein, and as to the compensation to be made to all parties for the damage that might be sustained by reason of the execution of the works of the said railway. And that the defendants, by their said notice, demanded from the plaintiff the particulars of his estate and interest in the said lands, and of the claims made by him in respect thereof; and that the said notice did state the particulars of the said lands so required; and that the defendants did, to wit, at the said time of serving the said notice, take the said lands of the plaintiff, for the execution of the works of the said railway; and the plaintiff thereby, then being so seised as aforesaid, became and was entitled to a large sum, exceeding 50*l.*, to wit, the sum of 4,500*l.*, as compensation from the defendants in respect of the said lands and of his interest therein; and that the plaintiff and the defendants did not, within twenty-one days after the service of the said notice by the said defendants, or at any time, agree as to the amount of compensation to be paid by the defendants for the said interest

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of the plaintiff in the said lands, or for any damage that might be sustained by him by reason of the execution of the works, or as to the amount of any other compensation; and that afterwards, to wit, on the 17th of July, 1849, to wit, after the expiration of the said space of twenty-one days, the plaintiff being so entitled to such compensation, and the compensation to which he was so entitled exceeding the sum of 50*l.*, and the defendants not having made, and no one having made satisfaction of or for the said compensation, or the said taking of the said lands, and the said compensation, being the compensation for the said taking, still remaining wholly unpaid, the plaintiff, then being seised as aforesaid, claimed such compensation to an amount exceeding 50*l.*, to wit, 4,500*l.*, and the plaintiff then was desirous to have the question of the said compensation so claimed by the plaintiff as aforesaid settled by a jury, and then gave to the defendants a notice in writing, (according to the provisions *of the statute in such case made and provided, to wit, the Lands Clauses Consolidation Act, (1845), that he was desirous to have the question of the compensation to which he was so entitled as aforesaid, in respect of his said estate and interest, and in respect of any damage that might be sustained by him by reason of the execution of the said railway works, settled by a jury; and the said last-mentioned notice also stated the nature of the interest in the said premises, in respect of which the plaintiff claimed such compensation as aforesaid, and the amount of compensation so claimed, to wit, 4,500*l.* Averment, that although twenty-one days after the giving of the said last-mentioned notice elapsed long before the commencement of this suit, yet the defendants did not, within the said period of twenty-one days, nor at any time before the commencement of this suit, pay to the plaintiff the amount of the said compensation so claimed by him as aforesaid, nor enter into any written agreement for that purpose, nor did nor would the defendants, within the said period of twenty-one days after the receipt of the said last-mentioned notice, nor at any time before the commencement of this suit, issue their warrant to the sheriff to summon a jury for settling the question of the compensation so claimed by plaintiff as aforesaid, in the manner provided by the said last-mentioned statute, or in any other manner, but on the contrary wholly neglected and refused so to do, and until and at the commencement of this suit still neglected and refused so to do, contrary to the form and provisions of the said last-mentioned statute; whereby and by force of the said statute, the defendants became liable to

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pay to the plaintiff the said sum of 4,500*l.* in the said last-mentioned notice specified, being the amount of compensation so claimed by the plaintiff as aforesaid; and thereby, and by force of the said last-mentioned statute, an action hath accrued to the plaintiff, to demand from the defendants the said sum of 4,500*l.* above demanded. Breach, non-payment thereof.

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The defendants pleaded, that they did not, at the time of serving the said notice in the said declaration first-mentioned, *or at any other time, take the said lands of the said plaintiff in the declaration mentioned, or any part thereof, *modo et formâ*; concluding to the country: and upon that plea issue was joined.

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At the trial of the cause, before Pollock, C. B., at the Middlesex sittings after last Hilary Term, it appeared that the action was brought by the plaintiff to recover the sum of 4,500*l.* against the Company, as the value of three dwelling-houses and premises situated in Birmingham, of which the plaintiff was the owner.

The defendants, in 1846, obtained an Act of Parliament, intituled "An Act for making a Railway from Birmingham to join the Lines of the proposed Oxford and Rugby, and Oxford, Worcester, and Wolverhampton Railways, to be called 'The Birmingham and Oxford Junction Railway,'" by which Act they were united into a Company for the purpose of making and maintaining such railway, with proper works and conveniences, and for those purposes were incorporated by the name of "The Birmingham and Oxford Junction Railway Company," and by that name were declared to be a body corporate with perpetual succession, and power to purchase and hold lands for the purposes of the undertaking (1). Another Act passed on the same day, intituled "An Act for making a Railway into Birmingham in extension of the proposed Birmingham and Oxford Junction Railway." The latter Act, which was for the purpose of making a connecting line with the former line, contained the same powers of purchasing land; and by it the two undertakings were amalgamated, under the title of "The Birmingham and Oxford Junction Railway Company." By each of the preceding Acts, the Companies Clauses Consolidation Act, 8 Vict. c. 16, the Lands Clauses Consolidation Act, 8 Vict. c. 18, and the Railways Clauses Consolidation Act, 8 Vict. c. 20, were incorporated.

On the 9th of January, 1847, the plaintiff received a notice from the defendants in the following form:

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“Birmingham and Oxford Junction Railway.”

“In pursuance of the Birmingham and Oxford Junction Railway Act, 1846, and the several Acts of Parliament incorporated therewith, I do hereby, on behalf of the Birmingham and Oxford Junction Railway Company, give you notice, that the said railway will pass through messuages or tenements, workshops, outbuildings, yards, and entry, situated in the parish of Birmingham, in the county of Warwick, and numbered 140, 141, 142, and 143, on the plan and in the book of reference deposited in the office of the clerk of the peace for the county of Warwick, and which premises belong or are reputed to belong to you or some one of you, or in which you or some one of you have or claim to have some estate or interest. And I further give you notice, that the Birmingham and Oxford Junction Railway Company require to purchase and take the said premises for the purposes of the said railway; and that the premises so required to be purchased and taken are coloured red upon the plan hereunto annexed; and that the said Company are willing to treat for the purchase thereof, and of all subsisting leases, term, estates, and interests therein, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the said works. And the said Company do hereby demand from you and each of you the particulars of your estate and interest in the premises so required to be purchased and taken, and of the claims made by you in respect thereof, such particulars to be delivered at the office of the secretary of the said Company, No. 34, Bennett's Hill, Birmingham, not later than twenty-one days from the service of this notice. And the said Company do hereby demand and require of you to produce to the said secretary, at his office aforesaid, within twenty-one days from the service of *this notice, any lease or grant for a longer period than one year, under or in respect of which you have or claim to have any estate or interest in the premises so required to be purchased and taken.

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“Dated this 7th day of January, 1847.

“JOHN WILLIAM KIRSHAW,
“Secretary to the said Company.”

“To Mr. Richard Bates, Mrs. Bates, Mr. Charles Burkinshaw, and to all and every other person and persons whom it may concern :

“Mr. Hornblower, of Birmingham, is the agent appointed by the Birmingham and Oxford Junction Railway Company to treat for the purchase of the property to which this notice relates.”

Upon the receipt of this notice, the plaintiff delivered to the defendants particulars, as required thereby, stating the amount he claimed, as the value of the houses to be 4,500*l.*, and he required the payment of that sum, or that the defendants should issue a warrant to summon a jury to assess the amount under the Act. No further step was taken by the Company in the matter.

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Upon this state of facts, it was contended, on the part of the defendants, that the plaintiff's land had not been taken, within the meaning of the 68th section of the Lands *Clauses Consolidation Act (8 Vict. c. 18). A verdict was thereupon entered for the plaintiff for the amount claimed, with leave to the defendants to move to set that verdict aside, and to enter a verdict for them.

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Whateley obtained a rule *nisi* accordingly; and in the present Term (May 30)

Martin, Aspland, and *T. Y Lee*, showed cause :

The plaintiff is entitled to recover the amount he claims in this action, for the defendants have taken his land, according to the true construction of the 68th sect. of the 8 Vict. c. 18. The effect of the notice was to entitle the defendants absolutely to the land. The plaintiff had lost all power of disposing of it after the notice ; and as the amount claimed by him as the value of the property was not disputed by the defendants, (for they did not take any further steps after giving the notice and receiving his claim,) they are liable for the full amount so demanded. By their silence they admit the amount to be correct. It is in the nature of a judgment by default. In *Rex v. The Hungerford Market Company* (1), *where the defendants were empowered under their Act, 11 Geo. IV. c. lxx., to purchase certain premises, and, by the 6th section, if the person interested in the premises should, for twenty-one days next after the notice given him by the Company, refuse to treat, or not agree for the sale of them, in all such cases the Company were to cause the value of and recompense to be made for such premises to be ascertained by a jury ; and it was there held, that the notice was binding upon the Company, and that they were not entitled to withdraw from it even on payment of all reasonable costs incurred by the occupier of the land in consequence of the notice. And in a similar case, of *Salmon v. Randall* (2), Lord COTTENHAM said, " The parties, I conceive, are put into the situation of vendor and purchaser by the notice ; and, like every other vendor and purchaser,

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(1) 38 R. R. 253 (4 B. & Ad. 327).

(2) 45 R. R. 306 (3 My. & Cr. 449).

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they must of course complete their purchase according to the provisions, not of the contract, but of those arrangements which the Act of Parliament has substituted in lieu of the contract in a case where no contract can take place." So, in the present case, the statute makes a complete contract between the owner of the property and the Company upon the giving of the notice. It is not necessary that there should have been an entry upon the land: the notice, in effect, constitutes a taking within the meaning of the 68th section. The statute does not speak of a notice to take; and the 84th section uses the word "enter," which is an argument against that construction by which it will be contended that the taking must be by entry or some equivalent act. From the 16th to the 68th sections the enactments taken together constitute a code under which a compulsory contract is created by the statute. A new code commences with the 69th section, coming under a different and distinct heading. In *Stamps v. Birmingham and Stour Valley Railway Company* (1), Lord COTTENHAM says, "I have decided, *and decided generally in all cases where the question has arisen, that, where a Company gives notice to purchase, and where they have described the quantity of land that they require, by that means they enter into a contract with the landowner to make the purchase, and that, therefore, they cannot afterwards depart from it; they cannot say, I have agreed with you to purchase two acres of your land, but I now find that we do not require it, and I give you notice that I mean only to purchase one acre." And in *Eaton v. Midland Great Western Railway Company* (2), where the owner of the property received a notice from a Railway Company, and he replied to the notice by stating his title to the lands and the amount he claimed, and the Company neither referred the matter to arbitration, nor summoned a jury to decide it—it was held that the statute in question gave the owner of the property a right of action for the amount claimed. They also referred to *Walker v. Eastern Counties Railway Company* (3), *Reg. v. The Commissioners of Woods and Forests* (4), *Corrigal v. London and Blackwall Railway Company* (5), *Ramsden v. Manchester and South Junction Railway Company* (6), *Doe d. Hutchinson v. Manchester, Bury, and Rossendale Railway Company* (7), and *Rex v. Nottingham Old Water Works Company* (8).

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(1) 7 Hare, 251; see 78 R. R. 240.

(2) 10 Ir. Rep. 310.

(3) 5 Bail. Cas. 469.

(4) 17 L. J. Q. B. 341.

(5) 5 Man. & G. 219.

(6) 74 R. R. 830 (1 Ex. 723).

(7) 69 R. R. 785 (14 M. & W. 687).

(8) 45 R. R. 484 (6 Ad. & El. 336).

Whateley and F. Robinson, in support of the rule :

The question is, whether the defendants, by the mere fact of having given the plaintiff notice that they will take his land, are to be considered as having taken that land within the true meaning of the 68th section. If the Act had cast the duty upon the Company of issuing a precept to summon the jury, and of performing the various matters in order to *ascertain the value of the land within the period of twenty-one days, the argument on the part of the plaintiff, that the Company are to be considered as bound to pay the price set upon the property by the plaintiff, might have some weight; but there is no provision in the Act by which the Company are required to perform all these matters. The 68th section requires that there should be an actual taking of possession, or some other act done by which the land is injuriously affected. The defendants admit that by the notice they have rendered themselves liable to take the land, and perhaps in equity they may be held to have taken it; and the authorities cited may lead to that conclusion. There may be a statutory contract to take, but there has not been a taking within the 68th section. That section does not provide for the same kind of compensation as has already been provided for by the preceding sections. The sections which precede the 68th apply to the constructive taking; and then comes the 68th, which provides for the actual taking of, or an injury done to, the land. According to the plaintiff's view of the meaning of the 68th section, the actual construction of a bridge upon his land would not be within that section. This notice amounts to a mere notice to take the land within the 18th section. In *Eaton v. Midland Great Western Railway Company*, it appeared upon the face of the declaration that there had been an entry by the Company upon the land.

Cur. adv. vult.

The judgment of the COURT was now delivered by

POLLOCK, C. B. :

This was a motion to enter a verdict in this case for the defendants; and the question raised at the trial, and argued by *Mr. Martin* for the plaintiff, and *Mr. Whateley* for the defendants, is a very important one. The plaintiff is the proprietor of three houses, which were included in the property liable to be taken by the defendants *under their Act for making a railway. In pursuance of the powers

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contained in the Act 8 Vict. c. 18, s. 18, notice was, on the 9th day of January, 1847, given by the promoters of the undertaking to the plaintiff, that his property would be required by them for it; and by the notice they demanded of him the particulars of his interest therein, and stated their willingness to treat with him for the purchase of the same. These particulars were duly furnished, and a value, 4,500*l.*, put on the property by the plaintiff, which amount he claimed from the promoters, as a compensation for taking these premises. He required payment of this amount, or that a warrant should be issued by the Company to summon a jury to assess the proper amount, under the provisions of the Act. The Company neglected for twenty-one days and upwards to do either, and the question is, whether the plaintiff, upon these facts, can maintain an action, and recover as damages the amount of 4,500*l.* so claimed by him. And this depends upon the construction to be put by the Court on the 68th section of the 8 Vict. c. 18.

By that section, when lands shall have been taken for, or injuriously affected by, the execution of the works, and for which the promoters shall not have made any compensation, a party claiming a compensation exceeding 50*l.* may have it settled by arbitration, or by a jury; and if he selects, as he has done here, a jury, the promoters are bound to summon one in twenty-one days, and in default thereof are made liable to pay the party so entitled the amount of the compensation so claimed, and the same may be recovered by action, with costs, in any of the superior Courts.

Now, the question here is, what is the meaning of the words "lands taken for the execution of the works;" for it is to such lands alone that the clause applies. It has been determined on several occasions by Lord COTTENHAM, and, independently of his high authority, we entirely concur in that opinion, that where a Company, as here, give notice to *a party that they require his lands for their works, it amounts to an agreement by them for the purchase of those lands, assented to by the opposite party, on the terms of making the compensation in the way appointed by the Act under which such notice is given, and binds both parties finally. In some sense therefore, lands, upon such notice being given, may be described as lands taken for the execution of the works. And so, in one case, the Court of Queen's Bench called them, and we think correctly. But the point is, whether the "lands taken" in the 68th section mean lands actually taken into the possession of the Company, and those alone. And, after carefully considering the

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various clauses of the Act preceding the 68th section, we have arrived at the conclusion, that this is the correct construction. The whole of this part of the Act, beginning at the 16th section and ending at the 68th inclusive, seems to us to form, so to speak, one code on this subject, and to provide successively for all the various cases that were likely to occur. It is preceded by this preamble—“And, with respect to the taking and purchase of lands otherwise than by agreement, be it enacted:” then follow the 16th and 17th sections, providing when those powers may be put in force. And then follows the 18th, as to giving notice of the lands required, and the compulsory treating for the same in case the notice does not lead to an agreement without further dispute; the disputed claims, if any, under 50*l.*, are settled by the 22nd and 24th sections, by the determination of two justices, in all cases. If the compensation exceeds 50*l.*, then, by the 23rd section, an option is given to the party claiming to have an arbitration, and if this be adopted it is to be carried into effect by the sections beginning at the 25th and ending at the 37th inclusive. Then begin the clauses as to the settlement of the dispute by the verdict of a jury, where the party claiming appears. Those end with the 57th section. The 58th to the 67th then follow, as to the assessment of the value of the land comprised in the notice *in the case of owners who are absent. This is to be done by a surveyor duly appointed, with a limited power of subsequent arbitration or assessment by a jury, if required by the absent party. Now, these provisions really exhaust the whole of the cases in which the Company give notice of requiring the lands of the owners adversely, where the Company requiring those are not in possession of the lands, and can only obtain that possession upon payment of the ascertained compensation. But another class might exist, and require to be provided for, in which the above provisions could not be applied, and that was the class where the Company had been permitted to take possession, without any distinct agreement for compensation, or where, in the execution of their works, injury not originally in the contemplation either of the Company or of the owners, was actually incurred. And the literal meaning of the words, land which shall have been taken, or shall have been injuriously affected—not land which shall be taken or shall be injuriously affected,—clearly, we think, points to this class alone. Independently, therefore, of the argument, not an unimportant one, that the construction contended for by *Mr. Martin* would not give full effect to both the 23rd and 68th sections,

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but make them in some degree inconsistent, we have come to the conclusion, that, upon the true construction of the 68th section, the words, "land taken, &c.," include lands only actually taken or actually affected by the Company, and consequently that, these lands not having been so taken, this action cannot be sustained against the defendants.

The result is, therefore, that the rule must be made absolute.

Rule absolute.

1850.
May 22.

DOE D. BAKER AND OTHERS v. JONES.

(5 Ex. 498—505; S. C. 19 L. J. Ex. 405.)

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The receipt of rent is no waiver of a continuing breach of covenant. Therefore, where a lessee was bound, under penalty of forfeiture, to repair within a reasonable time, and after breach the lessor accepted rent: Held, that the reasonable time for reparation did not commence afresh after such acceptance of rent.

THIS was an action of ejectment to recover the possession of certain premises, situate in Chapel Street, Edgeware Road, on a forfeiture by breach of covenant in not repairing. The cause came on for trial before Pollock, C. B., at the Middlesex sittings after Michaelmas Term, 1848; when a verdict was taken by consent for the lessors of the plaintiff, subject to the award of an arbitrator, to whom the cause, and all matters in difference between the said parties and one R. Darch, who agreed to become a party to the submission, were referred. The arbitrator awarded (*inter alia*) as follows: "I find that, by a building lease, being an indenture dated the 1st of July, 1808, and made between J. Buck, of the first part; J. Stephens and D. Bullock, of the second part; J. Ward, of the third part; J. Walton, of the fourth part; and E. Welch, of the fifth part; the said parties of the first, second, third, and fourth parts, did demise to the said E. Welch the land sought to be recovered in this action, for 99 years, from Christmas, 1792, at the rent therein mentioned; and if the lessees should at any time use the premises, or any part thereof, for any manufactory save as a floorcloth manufactory as then used, or for any trade

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*or business whatsoever, without the licence in writing under the hands of the lessors, then yielding and paying, for the residue then to come of the said term, over and above the rent therein-before reserved, the monthly rent of 50*l*. The lease contained a covenant by the lessee, for himself and his assigns, that he and his assigns would, at their own cost and charges, well and

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sufficiently repair, uphold, support, sustain, maintain, tile, slate, lead, paint, pave, purge, scour, cleanse, empty, amend, and keep the same premises, and every part thereof, with all and all manner of needful and necessary reparations and amendments whatsoever, when and so often as need or occasion should require, during all the said term; and a proviso, that in case of breach or non-performance or non-observance of any of the covenants, clauses, or agreements in the lease, the lessors might enter and put an end to the term. I find that the reversion in fee, expectant on the termination of the said term, became vested in the lessors of the plaintiff prior to September, 1846, and has so continued vested to the present time. In that month one R. Darch, who proposed to become tenant of the premises, went over them with R. Cantwell, a surveyor, on behalf of the lessors of the plaintiff, and pointed out to him certain alterations he wished to make therein, which consisted in moving certain outbuildings, and making excavations for saw-pits and veneer-pits. On the 12th of October, 1846, the lessors of the plaintiff signed a memorandum, directed to J. Welch, or other the tenants of the premises, whereby they gave full licence and authority to carry on the trade or business of a timber-merchant on the premises, adding the words, 'provided that any alterations therein or thereto be made to the satisfaction of our surveyor, Mr. Robert Cantwell, testified by writing under his hand.' On the 18th of March, 1847, the residue of the term was assigned to the defendant, D. Jones, and on the 3rd of April in that year he paid the rent due under the lease up to the 25th of the preceding *March. For a long time before and at the time of this payment, the whole of the premises were out of repair, owing to the neglect of the lessees to perform their covenant to repair. Part of the outbuildings, consisting of a shed, stable, and cow-house, were in such a state of dilapidation that they could not be repaired, and it was necessary that they should be taken down and rebuilt. Shortly after this payment of the rent, R. Darch, who at that time had become tenant of the premises under the defendant, D. Jones, proceeded to (and in fact did) pull down all the last-mentioned outbuildings, and made certain excavations in a yard, part of the ground demised. He so acted with a *bonâ fide* intention of re-erecting the out-buildings, and also intended to use part of the space excavated as saw-pits, and the rest for veneer-pits, both required in his trade of a timber-merchant. On the 21st of October, 1847, the declaration in ejectment was served. At this

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time, the principal building, formerly used as a floor-cloth manufactory, had not been properly repaired, part of the out-buildings had been re-erected, and part had not been re-built, and the excavation before mentioned was in progress. Immediately after the service of the declaration in ejectment, the excavation was stayed, and the pit that had been dug was filled up. Upon this state of facts, it was contended by the lessors of the plaintiff, that a breach of covenant had been committed in pulling down the out-buildings, in general neglect to repair, and in making the excavations. On the part of the defendant it was contended, that the lease was to be considered as subsisting on the 25th of March, 1847, in consequence of the receipt of the rent up to that day; and that, looking at the state of the premises at that time, the lessee was to be allowed a reasonable time to pull down and rebuild the out-buildings, and generally to repair the whole premises. And as to the excavations, the defendant contended, that he was justified in making them by virtue of the lease, and under the circumstances stated. For the *purposes of disposing of the action of ejectment, I do award and determine, that, looking at the state of the premises on the 25th of March, 1847, if the lessees were entitled by law to a reasonable time from that day to put the premises in repair, such reasonable time had not elapsed when the declaration in ejectment was served. But I award and determine, that it was the duty of the lessee, from time to time, to repair the premises pursuant to the covenant, and that any reasonable time for so repairing must date from the time each particular reparation was required. And I also award and determine, that the lessors of the plaintiff had a right to re-enter on the day the declaration in ejectment was served, and that the verdict found by the jury is to stand."

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A rule had been obtained, calling on the lessors of the plaintiff to show cause why the award should not be referred back to the arbitrator, as far as it related to the action of ejectment; against which rule—

Martin and Cowling now showed cause :

The arbitrator has rightly decided that there was a breach of the covenant to repair, and consequently the lessors of the plaintiff are entitled to recover for a forfeiture. The receipt of rent, no doubt, affirmed the tenancy up to the time the rent became due, but there is no authority to show that it operated as an extension

of the time for repairing. The principle established in *Arnsby v. Woodward* (1), namely, that the receipt of rent by a landlord destroys his right to proceed for a forfeiture previously committed, does not apply here, for the non-repair of the premises was a continuing breach, which entitled the landlord to re-enter: *Doe d. Ambler v. Woodbridge* (2), 1 Wms. Saund. 288. In *Doe d. Flower v. Peck* (3), it was held, that though a distress for rent, made on the 30th September, was a waiver of any forfeiture up to that time, yet the lessor of the plaintiff was entitled to recover in ejectment, for a continuing breach of *covenant in not insuring after the 30th September. *Doe d. Muston v. Gladwin* (4) also shows, that a waiver of forfeiture by the acceptance of rent is confined to the period when the rent was received. A lessor has a right to have the premises kept in repair at all times during the term: *Luxmore v. Robson* (5); and a reasonable time for repairing does not commence afresh after each act of waiver, but the time continues running. It would have been no answer to an action of covenant, to plead that the plaintiff authorised the defendant to leave the premises out of repair, for a covenant cannot be discharged by a parol licence: *Roe d. Gregson v. Harrison* (6).

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Hayes, in support of the rule :

The receipt of rent operates as an affirmation of the tenancy, and therefore an action of covenant may be maintained, though ejectment will not lie. A tenancy may be affirmed, not only in respect of past breaches, but also prospectively. Thus, where a lease contained covenants to keep the premises in repair, and also to repair within three months after notice, and the premises being out of repair, the landlord gave a notice to repair within three months, that was held a waiver of the forfeiture incurred by breach of the general covenant to keep the premises in repair, and that the landlord could not bring ejectment until after the expiration of the three months: *Doe d. Morecraft v. Meux* (7). BAYLEY, J., in delivering judgment, distinguishes that case from *Roe d. Goatly v. Paine* (8), where the tenant was required to put the premises in repair forthwith. *Doe d. De Rutzen v. Lewis* (9) proceeded on the same principle. * * So here the plaintiff, having given a

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(1) 6 B. & C. 519.

(2) 33 R. R. 203 (9 B. & C. 376).

(3) 35 R. R. 339 (1 B. & Ad. 428).

(4) 66 R. R. 611 (6 Q. B. 953).

(5) 19 R. R. 396 (6 B. & Ald. 584).

(6) 1 R. R. 513 (2 T. R. 425).

(7) 28 R. R. 426 (4 B. & C. 606).

(8) 2 Camp. 520.

(9) 44 R. R. 414 (5 Ad. & El. 277).

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licence to the defendant to make extensive alterations on the premises, cannot bring ejectment before they are completed, for the licence is in effect a declaration by the plaintiff, that the defendant shall continue as tenant while the alterations are going on. By the acceptance of rent the lease was affirmed up to the 25th of March, 1847; and there is no forfeiture unless there was a new breach after that time.

(ALDERSON, B.: Suppose the arbitrator had found that twelve weeks was a reasonable time for repairing, and that ten weeks had elapsed when the rent was received, would the defendant have two or twelve weeks more?)

The past neglect would be waived, and there would be no breach until a subsequent neglect to repair within a reasonable time. The acceptance of rent bars the entry, because it shows the lessor's intent and election to have the lease continue: *Marsh v. Curteys* (1). (He also referred to *Doe d. Darlington v. Ulph* (2).)

[504] POLLOCK, C. B. :

The rule must be discharged. The question is, whether the action of ejectment is properly disposed of by this finding—"I do award and determine, that, looking at the state of the premises on the 25th of March, 1847, if the lessee were entitled by law to a reasonable time from that day to put the premises in repair, such reasonable time had not elapsed when the declaration in ejectment was served. But I award and determine that it was the duty of the lessee from time to time to repair the premises, pursuant to the covenant, and that any reasonable time for so repairing must date from the time each particular reparation was required." That appears to me to be the correct rule of law, and we cannot lay it down that a new time for reparation commences after each receipt of rent. There may be a considerable distinction between the case of an actual breach before the receipt of rent, the reasonable time having elapsed, and where the reasonable time is still running, because in the latter case there is no breach to waive, but in the former there is some ground for saying that the acceptance of rent is a waiver of the forfeiture actually incurred. However, I do not mean to express an opinion in favour of the proposition which *Mr. Hayes* has contended for, and, I must own, not without some show

(1) Cro. Eliz. 528.

(2) 78 R. R. 354 (13 Q. B. 204).

of reason ; it is sufficient to say, that, upon the present award and finding, the question must be decided in favour of the lessors of the plaintiff, unless, as a matter of law, the lessees were entitled to a reasonable time for reparation after the rent received became due, which I think they were not.

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ALDERSON, B. :

I do not feel the same difficulty as the LORD CHIEF BARON. The receipt of rent is a waiver of all forfeitures, which are, so to speak, single and complete, and are not in the nature of continuing forfeitures. So with respect to continuing forfeitures, where the lessee is bound from time to time to keep the premises in repair, and he omits for an unreasonable time, but afterwards repairs them, there *the receipt of rent waives the previous forfeiture. But where the matter is plainly a continuing breach, the only question is, whether, when the party seeks to re-enter, the premises have been an unreasonable time out of repair and so continue.

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ROLFE, B. :

I am of the same opinion. If, instead of "a reasonable time," the lease had named five days, within which the lessee was to repair, there could have been no difficulty, because the five days had elapsed on the 25th March, 1847 : the receipt of rent would have been a waiver of the actual breach, but it would have been no waiver of a neglect to repair between the 21st and 25th, for then there was no complete breach.

PLATT, B. :

It is a fallacy to say that the receipt of rent was a waiver of the breach of contract to repair, for it was a continuing breach, and until the repairs were perfected, the lessors of the plaintiff were entitled to re-enter for the forfeiture.

Rule discharged.

TOWNEND v. WOODRUFF AND OTHERS.

(5 Ex. 506—513 ; S. C. 19 L. J. Ex. 315.)

1850.
June 3.

A person who exposes goods for sale in a public market has a right to occupy the soil with baskets necessary and proper for containing the goods.

Trespass for taking the plaintiff's goods, to wit, potatoes, baskets, &c. Pleas, first, that W. was possessed of a close, called May Day Green, and because the goods were wrongfully upon the close, incumbering the same, the defendants, as the servants of W., took the goods and removed them ;

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secondly, that T. was possessed of a close, part of land called May Day Green, and because the goods were wrongfully upon the last-mentioned close, incumbering the same, the defendants, as the servants of T., removed them. Replication to first plea, that a market was held upon the close in which &c., for the buying and selling provisions, and the plaintiff brought into the close in which &c., into the market, the potatoes, for the purpose of selling the same, and also then brought the baskets, being necessary and proper for holding and containing the same, being no inconvenience to the holding of the market, when the defendants of their own wrong seized them. The replication to the second plea was in similar terms. Rejoinder to replication to first plea—That A., being seised in fee of the close called May Day Green, and also of the market, demised the close to W.; and because the goods were wrongfully on the close, the defendants, as the servants of W., took and removed them. Rejoinder to replication to second plea—That A. being seised in fee of May Day Green, and also of the market, which was held as well upon the close in the second plea mentioned, as upon other parts of May Day Green, demised to W. the said close and other parts of May Day Green; that W. demised the close, being such part of May Day Green, to T. for the purpose of erecting a stall thereon for selling goods in the market, the said close not being an unreasonable quantity of land for that purpose, and there being sufficient ground left for other persons resorting to the market; and because the goods were wrongfully placed on the close without the leave of T., the defendants, as her servants, took the goods and removed them: Held, on demurrer, that the rejoinders were bad, inasmuch as the demise to W. was subject to the right of market.

TRESPASS for seizing and taking the plaintiff's goods and chattels, to wit, potatoes, onions, hampers, baskets, measures, scales, and weights.

Second plea: That before and at the said time when &c. the defendant J. Woodruff was lawfully possessed of a certain close, called May Day Green, situate in the parish of Barnsley, in the county of York, and because the goods and chattels in the declaration mentioned, before and at the said time when &c., were wrongfully in and upon the said close, incumbering the same and doing damage there to the defendant J. Woodruff, and because the plaintiff, when requested so to do by the defendant, J. Woodruff, refused to remove the said goods and chattels from and off the said close, the defendant J. Woodruff in his own right, and the other defendants as his servants and by his command, seized and took the said goods and chattels in the said close so incumbering the same, and removed and carried away the same to a small and convenient distance, to wit, to the distance of ten yards from the said close, and there left the same for the use *of the plaintiff, doing no unnecessary damage to the said goods, &c.; *quæ sunt eadem*, &c. Verification.

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Fifth plea: That, before and at the time when &c., one Mary Thompson was lawfully possessed of a certain close, part and parcel

of certain land called May Day Green, situate &c., and because the goods and chattels in the declaration mentioned, before and at the same time when &c., were wrongfully in and upon the last-mentioned close, incumbering the same and doing damage to Mary Thompson, the defendants at the said time when &c., as the servants of Mary Thompson and by her command, seized and took the said goods and chattels in the last-mentioned close so incumbering the same, and removed and carried away the same to a small and convenient distance &c., doing no unnecessary damage, &c.; *quæ sunt eudem*. Verification.

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Replication to the second plea: That, long before and until and at the said time when &c., there of right has been, and of right has been used and accustomed to be, and still of right ought to be, a certain public market held in and upon the said close in which &c., on Wednesday in each and every week throughout the year, for the buying and selling of all and all manner of provisions; and that, before and at the said time when &c., the same being on Wednesday, a certain public market was duly held in and upon the said close in which &c., for the buying and selling of all and all manner of provisions as aforesaid; and that the plaintiff, then being a person obtaining his livelihood by buying and selling provisions, before the said time when &c., to wit, on &c., brought into the said close in which &c., into the said public market there, the potatoes and onions in the declaration mentioned, for the purpose of exposing to sale and selling the same in the said market, the same being provisions as aforesaid, and then brought, together with the said potatoes and onions, the said hampers, baskets, &c., into the said close in which &c., the said hampers and baskets then holding and containing the said *potatoes and onions, and being necessary and proper for holding and containing the same, and being commonly of right used in the said market for that purpose, and being no inconvenience or annoyance to the holding the said market, or to any person buying or selling or trafficking thereat or therein, and the said measures, scales, and weights being necessary and proper utensils and implements of the said business of the plaintiff for, and being necessary and proper for, the measuring and weighing out of the said provisions on the sale thereof, and being commonly of right used in the said market for that purpose, and being no inconvenience or annoyance to the holding the said market, or to any person buying or selling or trafficking thereat or therein, which said potatoes and onions were in and upon the said close in which &c., so by the plaintiff exposed for sale as aforesaid, and held and contained as aforesaid,

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aforesaid, until the defendants of their own wrong afterwards, on the said Wednesday, during the said market so as aforesaid held, to wit, on &c., the said potatoes and onions in and upon the said close in which &c., in the said market so as aforesaid exposed to sale, and held and contained as aforesaid, with the said measures, scales, and weights, and other weights for the purpose aforesaid, seized, took, and conveyed away as in the declaration mentioned. Verification.

The replication to the fifth plea was in terms the same.

[*509] Rejoinder to the replication to the second plea: That before and at the time of the making of the demise hereinafter next mentioned, William Pitt, Earl Amherst, Henry Thomas, Earl of Chichester, and the Reverend William Alderson, clerk, were seised in their demesne as of fee of and in the said close called May Day Green, and were also seised as of fee of the said market, and being so seised, they the said William Pitt, Earl Amherst, Henry Thomas, Earl of Chichester, and the Reverend William Alderson, clerk, *before the said time when &c., to wit on &c., demised the said close, called May Day Green, to the defendant Joseph Woodruff, for one whole year then next ensuing, and so on, from year to year, as long as they the said William Pitt, Earl Amherst, Henry Thomas, Earl of Chichester, and the Reverend William Alderson, clerk, and the said Joseph Woodruff, should respectively please; by virtue of which said demise the said Joseph Woodruff, afterwards and before the said time when &c., to wit, on &c., entered into and upon the said close called May Day Green, and became and was possessed thereof as in the said second plea mentioned. That the defendant, Joseph Woodruff, being so possessed of the said close called May Day Green, the plaintiff, before the said time when &c., had wrongfully, and without the leave or licence and against the will of the said Joseph Woodruff, put, placed, and set down the goods and chattels in the declaration mentioned, and because the same were at the said time when &c., without the leave or licence and against the will of the said Joseph Woodruff, wrongfully in and upon the said close, and set down and standing, lying, and resting in and upon the soil and ground thereof, and incumbering the same close, and doing damage there to the said Joseph Woodruff, and because the plaintiff, when requested so to do by the said Joseph Woodruff as aforesaid, refused to remove the said goods and chattels, he the defendant Joseph Woodruff in his own right, and the other defendants as his servants and by his command, seized and took the said

goods and chattels in the said close so incumbering the same as aforesaid, and removed and carried away the same to a small and convenient distance, and there left the same for the use of the plaintiff, doing no unnecessary damage &c., as they lawfully might for the cause aforesaid. Verification.

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The rejoinder to the replication to the fifth plea stated, that the same persons "were seised in their demesne as *of fee of and in the land called May Day Green, in the fifth plea mentioned, and were also seised as of fee of the market in the replication to the fifth plea mentioned, and which said market, before and at the said time when &c., was held as well in and upon the said close in the fifth plea mentioned, as in and upon other parts of the said land called May Day Green." It then stated, as in the other rejoinder, a demise to Joseph Woodruff of "the said close in the fifth plea mentioned, and the said other parts of the said land called May Day Green, in and upon which the said market was so held as aforesaid;" by virtue of which said demise Joseph Woodruff entered and was possessed thereof. That Joseph Woodruff, being so possessed, "before the said time when &c., to wit, on &c., demised and let the close in the fifth plea mentioned, being such part and parcel of the said land called May Day Green, to the said Mary Thompson for a certain term, to wit, for the term of half a year, for the purpose of erecting a certain stall or standing in and upon the said close, being such part and parcel of the said land called May Day Green, and in the said market so held thereon, and on the said other parts of the said land called May Day Green, for the purpose of selling and disposing of goods and chattels at such stall or standing in the said market, the said close so being such part and parcel of the said land called May Day Green, not being an unreasonable quantity of land for that purpose, and there being sufficient market ground left for all other persons resorting thereto, and for all the purposes of the said market." The rejoinder then stated that Mary Thompson entered and was possessed of the said close, and because the goods were wrongfully placed thereon without the leave or licence of Mary Thompson, the defendants as her servants took the goods and removed them to a convenient distance &c. Verification.

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Special demurrer to the rejoinder to the replication to the second plea, assigning for causes (amongst others), that *the rejoinder is either a denial of the replication, in which case it is informal, and also should have concluded to the country; or it confesses the replication, and avoids it by matter which is either immaterial or

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WOODRUFF. improperly pleaded : also, that the defendants ought to have shown by what right the owners in fee of the close and market demised the market, freed from and independent of the right to hold the market.

There was a demurrer on similar grounds to the rejoinder to the replication to the fifth plea.

The defendants' points were, that the replications were insufficient, inasmuch as they admitted that the goods were upon the *locus in quo* incumbering the ground, without showing any right to stallage or standage by licence from the owners of the soil or otherwise, or any satisfaction made to the owners of the soil for the use of it.

Cowling, in support of the demurrers :

The rejoinders are bad in form and substance. Their meaning is ambiguous. If intended to be a traverse of the right to hold the market, the traverse is informal ; but if they admit the public right of market, they are bad in substance, for then it becomes immaterial whether or no the goods were placed there with the licence of Woodruff or his lessee.

[*512] The main question, however, is, whether the replications are good ; and it is submitted that they are. Every person who brings to a market goods for sale has a right to place them on the ground, subject to groundage. The plaintiff does not set up a claim of piccage, or in any way to interfere with the soil. *The Mayor of Launson's* case (1), and *Austin v. Whittred* (2), are express authorities that goods brought to a market, and there set on the ground, are not *damage feasant*, and cannot be distrained as such, though the owner refuse to pay toll : *Wigley v. Peachy* (3), *Mayor *of Norwich v. Swann* (4), and *Mayor of Northampton v. Ward* (5), do not militate against this view, but only decide that trespass lies for setting tables or erecting stalls in a market-place, without leave of the owner of the soil. If the plaintiff has occupied more ground than he ought to have done, the owner's remedy is not by distress, but by an action for compensation for the use of the soil.

Tomlinson, *contra* :

The question is best raised by the last replication and rejoinder. The goods were *damage feasant* on the close demised to Mary

(1) Cro. Eliz. 75.

(2) Willes, 623.

(3) Ld. Ray. 1589.

(4) 2 W. Bl. 1115.

(5) 2 Str. 1238 ; 1 Wils. 107.

Thompson. A person entitled to sell goods in a market has no right to occupy the ground with baskets and measures to the exclusion of others. In *Austin v. Whittred*, the defendant relied rather upon his title to the market than on his title to the soil. In *Mayor of Norwich v. Swann*, the right to occupy ground in a market was construed with greater strictness than in the previous cases. In *Mayor of Northampton v. Ward*, the COURT said, "that, by law, every man has, of common right, a liberty of coming into any public market, to buy and sell, without paying any toll, if it be not due by custom or prescription; but if he requires any particular easement or convenience, as a stall in the market, he must have the licence of the owner of the soil for that purpose, if there be no particular sum fixed by the custom of the market for stallage; but if there be a fixed sum or duty by custom, that cannot be exceeded, but still he must agree with the owner of the soil."

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(ALDERSON, B.: Erecting a stall is very different from placing goods in baskets on the ground for sale. A person must bring his produce to market in baskets or sacks, or other convenient modes.

POLLOCK, C. B.: We are all clearly against you on this point.)

The rejoinder to the replication to the fifth plea is good. The defendants justify the removal of the plaintiff's goods as incumbering a close. The plaintiff replies that a public *market was held in the close, to which the defendants rejoin a demise of a portion of the close for a stall, sufficient room in the market being left for other persons. *Prince v. Lewis* (1) shows, that the owner of a market is not bound to appropriate the whole space to the purposes of the market, if sufficient remain for accommodation of the persons resorting to it. (He also referred to *Bennington v. Taylor* (2) and *Lockwood v. Wood* (3).)

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Cowling, in reply :

This is not the case of a letting of a stall to Mary Thompson. The defendant Woodruff had only a demise of the close, not of the market, and he demised a part of the close to Mary Thompson, but the right to regulate the market remained in the lords.

(1) 29 R. B. 265 (5 B. & C. 363).

(3) 66 R. B. 265 (6 Q. B. 31).

(2) 2 Lutw. 1517.

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Our judgment must be for the plaintiff. The defendant Woodruff justifies under a demise of the close by the owners in fee, but that is subject to the right of market stated in the replication. Mary Thompson takes under a demise by Woodruff of a part of the close, and consequently her right is subject to the same right of market.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiff.

1849.

Dec. 5.

1850.

June 4.

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SLEIGH v. SLEIGH (1).

(5 Ex. 514—518 ; S. C. 19 L. J. Ex. 345.)

The drawer of an accommodation bill cannot sue the acceptor for money paid to his use to the holder of the bill, unless not only the money paid *pro tanto* discharged the liability of the acceptor, but also the payment was made at his request, either express or implied. Therefore, where the plaintiff drew and indorsed for the accommodation of the defendant, the acceptor, a bill of exchange, which, when due, was dishonoured, and the plaintiff, without having received notice of dishonour, and without any request from the defendant, paid a part of the bill to the holder : Held, that he could not recover the amount from the defendant in an action for money paid to his use ; for there was no implied undertaking to indemnify against a payment which the drawer voluntarily made, with full knowledge that he was not bound to pay.

Quære, whether the same rule applies to cases where the legal obligation has been discharged by circumstances unknown to the drawer.

ASSUMPSIT for money paid to the defendant's use. Plea, *Non assumpsit*.

At the trial, before Parke, B., at the Middlesex sittings in Trinity Term, 1849, it appeared that the action was brought to recover the sum of 25*l.* paid by the plaintiff under the following circumstances: The plaintiff drew and indorsed a bill of exchange for 100*l.* for the defendant's accommodation. It was delivered to the defendant, and he negotiated it ; when due it was not paid by the defendant, but the plaintiff paid 25*l.* to the holder, in part, and that sum he sought to recover from the defendant in this form of action. The bill, not being taken up, remained in the hands of the holder, in order that he might recover the remainder from the defendant and other parties, and there was no proof of due presentment to the defendant, nor of notice of dishonour. The learned Judge directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a nonsuit.

(1) See *Ex parte Bishop* (1880) 15 Ch. D. 400.—J. G. P.

Crowder, in the same Term, obtained a rule *nisi* accordingly.
Against which—

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Martin and *Bernard* showed cause in the following Michaelmas vacation (Dec. 5) :

This was not a voluntary payment by the plaintiff in his own wrong. The drawer of a bill of exchange is under a moral obligation to pay it, especially where he signs his name as a surety, and if he chooses to waive due notice of dishonour, he may nevertheless recover against the acceptor. The defendant derived a benefit from the payment, for the holder of the bill could *only recover from him the residue : *Bacon v. Searles* (1).

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(PARKE, B. : No doubt this was money paid for the acceptor's use, because it exonerated him *pro tanto* ; but how was it paid at his request, for the plaintiff was not bound to pay the bill ?)

The payment was a benefit to the defendant, and therefore the law will imply a request. In point of law this was a contract of indemnity against any expense which the plaintiff might be put to by having drawn the bill : *Pownal v. Ferrand* (2), *Huntley v. Sanderson* (3). The defendant cannot take advantage of the want of notice of dishonour. As soon as he made default in the performance of his engagement, the plaintiff acquired an authority to pay the bill : *Alexander v. Vane* (4), *Simpson v. Penton* (5). * * *

Crowder, in support of the rule :

The plaintiff was in the same position as a drawer for value, and was not obliged to pay the bill, except upon the receipt of due notice of dishonour. He might have sued the defendant on the bill, but cannot recover for money paid to his use ; for the defendant *never requested him to dispense with notice of dishonour, or to pay the bill or any part of it. This was a voluntary payment by the plaintiff in his own wrong. In all the cases where a drawer has recovered against an acceptor for money paid to his use, the payment has been under compulsion, or, at all events, there has been a legal obligation to pay. Here the omission to

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(1) 1 H. Bl. 88.

(2) 30 R. R. 394 (6 B. & C. 439).

(3) 1 Cr. & M. 467.

(4) 1 M. & W. 511.

(5) 38 R. R. 663 (2 Cr. & M. 430).

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give notice of dishonour discharged the plaintiff from all liability in respect of the bill: *Ex parte Heath* (1), Bayley on Bills (2).

Cur. adv. vult.

The judgment of the COURT was now delivered by

PARKE, B.:

This case was tried before me in the sittings in Trinity Term last, when the plaintiff recovered a verdict, leave being reserved to the defendant to enter a nonsuit. A rule *nisi* was granted, and argued after Michaelmas Term.

The question is, whether the plaintiff can recover, in an action for money paid to the defendant's use, the sum of 25*l.*, which he paid under these circumstances. (His Lordship stated the facts as above set forth.) It must be taken, therefore, for the purposes of this suit, that the plaintiff has paid the money without being compellable at law to do so. Now, to make a person liable in this form of action for money paid to the defendant's use, the plaintiff must not merely show, that the money paid *pro tanto* discharges the liability of the defendant to the holder of the bill, but also that it was paid at the request, express or implied, of the defendant. Here the money paid clearly discharges *pro tanto* the liability of the defendant, as acceptor, to the holder; and it is also clear, that there was no express request from the defendant to the plaintiff to pay the money.

[*517] It remains, therefore, to be seen whether there was, from the circumstances, an implied request for him to do so. Now *there is no doubt, that, if a person lends his name to another for his accommodation, the party accommodated undertakes to pay the bill at maturity, and further, to indemnify the person accommodating him, in case that person is compelled to pay the bill for him (Byles on Bills, p. 94); and this, no doubt, is an implied authority to such person to pay it, if he be in that situation that he may be compelled by law to pay the bill, though the holder do not actually compel him to do so; and after payment he may sue the party accommodated for money paid on his account; for such payment is, in truth, under the implied authority given by the contract of accommodation between the parties; and whether this be a payment of the whole bill, or of only a part of it, makes no difference. But the defendant, as the person accommodated, has not, we think,

(1) 2 V. & B. 240.

(2) P. 295, 6th ed.

undertaken to indemnify the plaintiff against the consequences of any payment which the plaintiff may voluntarily make with knowledge of the circumstances. Whether it is so in cases in which the legal obligation has been discharged by circumstances unknown to him, as for instance, by the creditor having given time to the principal debtor without his knowledge, it is unnecessary to determine; but where a payment is made, as in this case, with the knowledge on the part of the plaintiff that he was not bound to pay, for the want of a notice of dishonour, to which he was unquestionably entitled, we think the payment is not made with the implied authority of the defendant. It is very true, that, if the plaintiff here had voluntarily paid the whole bill, he might have sued the defendant; but this is on another principle, viz., that the plaintiff becomes the holder of the bill after it is paid by him; and a holder so situated may, according to the law-merchant, sue the acceptor upon the bill itself; for the holder may always waive the want of due presentment and notice, and sue the acceptor, who is not discharged by the want of it, but not a collateral party, who is discharged by the same *laches*. But the holder in such case does not sue him as for the money paid to his use, *nor is a request, express or implied, in such a case at all material to his recovering the amount. But here the plaintiff cannot sue on the bill; for, not having paid it, he is not the holder; and he has on these facts only paid money to the holder voluntarily, and without request, express or implied, from the defendant. We are, therefore, of opinion that the defendant is entitled to a rule absolute to enter a nonsuit.

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v.
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[*518]

Rule absolute.

IN RE HOLBORN LAND TAX ASSESSMENT.

(5 Ex. 548—552.)

The Court of Exchequer has no jurisdiction to order the Commissioners of Land Tax to cause the proportion charged upon a division to be equally assessed.

THIS was a rule calling on the Commissioners of Land Tax for the Holborn division of the county of Middlesex to show cause why they should not meet and cause the proportion charged upon that division, for and towards the land tax for the current year, to be equally taxed and assessed within such division, and within every parish and place therein.

1850.
June 12.

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land tax within that division; and the affidavits in support of it stated that the proportion assessed on the Holborn division, towards the sum to be raised in the county of Middlesex, is 13,629*l.* 13*s.* 5*d.* That the amount of land *tax redeemed in that division is 2,846*l.* 10*s.* 3*d.*, which leaves 10,783*l.* 3*s.* 2*d.* to be raised as such proportion. That the Holborn division consists of the united parishes of St. Andrew Holborn and St. George the Martyr, the liberty of the Rolls, the parish of St. Marylebone, the parish of St. Pancras, the parish of St. John, Hampstead, and the parish of Paddington. That the annual value of the property now rateable in the said parishes to the land tax is as follows: St. Andrew and St. George, 158,807*l.*; the liberty of the Rolls, 9,160*l.*; St. Marylebone, 910,680*l.*; St. Pancras, 186,104*l.*; St. John, Hampstead, 11,296*l.*; Paddington, 8,885*l.*: making together 1,284,392*l.* That on the 19th April last, the Commissioners taxed and assessed, upon the united parishes of St. Andrew and St. George, towards the said proportion of 13,629*l.* 13*s.* 5*d.*, the sum of 9,018*l.* 13*s.* 4*d.*, giving credit for 11,181*l.* 10*s.* 6½*d.*, being the amount of land tax redeemed, leaving 7,837*l.* 2*s.* 9½*d.* to be raised, which required a rate of 1*s.* in the pound; upon the parish of St. Pancras, the sum of 1,399*l.* 5*s.* 2*d.*, giving credit for 394*l.* 11*s.* 4½*d.*, being the amount redeemed, leaving 1,004*l.* 13*s.* 9½*d.* to be raised, which required a rate of ½*d.* in the pound; upon the parish of St. John, Hampstead, 855*l.* 17*s.* 4*d.*, giving credit for 565*l.* 1*s.* 8*d.*, the amount redeemed, leaving 299*l.* 15*s.* 8*d.* to be raised, which required a rate of 6½*d.* in the pound; upon the parish of Paddington, the sum of 354*l.* 6*s.* 10*d.*, giving credit for 254*l.* 19*s.* 2¾*d.*, the amount redeemed, leaving 109*l.* 7*s.* 7½*d.* to be raised, which required a rate of 3½*d.* in the pound; upon the parish of St. Marylebone, 564*l.* 5*s.* 1*d.*, giving credit for 90*l.* 7*s.* 9*d.*, the amount redeemed, leaving 473*l.* 17*s.* 4*d.* to be raised, which required a rate of half a farthing in the pound. That no assessment had yet been made for the current year in respect of the liberty of the Rolls. The affidavits also stated, that the applicants had required the Commissioners to assess them in respect of their property at and after an equal pound rate to be assessed on the annual value of all *the property rateable to the land tax within the Holborn division, but the Commissioners refused to do so. That if the amount directed to be raised was equally taxed and assessed throughout that division, the same might be raised by a rate of five farthings in the pound.

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The *Attorney-General* showed cause :

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LAND TAX
ASSESSMENT.

There is no precedent for this application. The only authorities on the subject are the case of *The Commissioners of the Westminster Land Tax* (1), and *Lord Aylesford's* case (2) ; but they bear no analogy to the present case. In the former, the Commissioners had refused to levy the full quota upon the several divisions, in proportion to the sums assessed upon them respectively, by the 4 W. & M. In the latter case, the object of the application was to compel the Commissioners of Land Tax for the hundred of East Goscote, in the county of Leicester, to transmit into the Queen's Remembrancer's Office duplicates of the sum assessed on each parish within that hundred. In this case the total amount of the assessment has been levied ; and the application is in the nature of an appeal against the judgment and discretion of the Commissioners, as to the mode of apportioning the quota charged on the division in question.

(POLLOCK, C. B. : If we are to entertain this application, there seems no reason why we should not interfere with the Commissioners of the Income Tax or Assessed Taxes.)

The Court then called on

Peacock and *S. Miller* to support the rule :

The Court is only prevented from interposing where the jurisdiction of the Commissioners is final. In the case of *The Commissioners of the Westminster Land Tax*, this Court ordered the Commissioners to alter the quotas assessed by them on *particular parishes, and the same was done in *Lord Aylesford's* case.

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(POLLOCK, C. B. : If the Commissioners had omitted to assess any parish or division, or had charged any parish or division with a wrong sum, we might call on them to amend their return, and do justice by making the return correspond in amount with the sum required by the Act of Parliament to be levied. That seems to me all that the case of *The Commissioners of the Westminster Land Tax* imports. With respect to *Lord Aylesford's* case, at the time that was decided, the Commissioners of Land Tax were

(1) *Parker*, 74.

(2) This case is not reported, but was cited from the "Appendix to Minutes of Evidence before a Select

Committee of the House of Lords on the Burdens affecting Real Property," p. 44.

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required by the 38 Geo. III. c. 5, s. 8, to transmit a schedule of their assessments to the office of the Queen's Remembrancer; and assuming that decision to be correct, the foundation of the authority which the Court exercised was this, that the Commissioners being bound to deliver these public documents into the office of this Court as master of the revenue, it was the duty of the Court to see that the returns were correct. But now the duplicates are transmitted to the Commissioners of Stamps and Taxes, under the provisions of the 5 & 6 Will. IV. c. 20, s. 14 (1).)

That statute has not deprived this Court of its power to interfere where the Commissioners have neglected or exceeded their duty. The 38 Geo. III. c. 5, s. 8, requires the Commissioners to cause the several proportions charged on the several hundreds or other divisions, (in the manner directed by the 7th section) to be equally taxed and assessed within every such hundred and other division, and within every parish and place therein, according to the best of their judgment and discretion. So that this is not a mere question between the individual ratepayers, whether the assessment is right or wrong, but whether the Commissioners have placed themselves in a situation which authorises them to collect the tax. This case differs from that of an improper assessment under the Income Tax Act, because there the party grieved may appeal.

(POLLOCK, C. B. : Suppose the Income Tax Commissioners made no assessment whatever?)

[552] If the tax could not be collected, this Court would compel them to perform their duty. In *Lord Aylesford's* case the jurisdiction which the Court exercised was not merely with reference to the duplicates, but also to an equality of assessment.

POLLOCK, C. B. :

There does not appear to be any precedent for such an application as this, and I am not disposed to assume a jurisdiction never before exercised.

ROLFE, B. :

The rule calls on the Commissioners to show cause why they should not cause the proportion charged upon the Holborn division

(1) Repealed by 53 & 54 Vict. c. 21, s. 40. See 43 & 44 Vict. c. 19, s. 350.—J. G. P.

of the county of Middlesex to be equally taxed and assessed within such division. The answer is, that they have done that according to what they think right, and their judgment is final.

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ASSESSMENT

PLATT, B., concurred.

Rule discharged, with costs.

LOWE v. ROSS.

(5 Ex. 553—556; S. C. 19 L. J. Ex. 318.)

An action for use and occupation, under the Distress for Rent Act, 1737 (11 Geo. II. c. 19), s. 14, does not lie where there has not been an actual entry by the lessee.

1850.
June 20.

[553]

DEBT for the use and occupation of a house and premises. Plea, Never indebted. Issue thereon.

At the trial, before Maule, J., at the last Summer Assizes for the county of Surrey, it appeared that the defendant had taken the premises from the plaintiff under a lease for a year; but it was objected on the part of the defendant, that the facts did not amount to an entry by the defendant upon the premises, and therefore that he was not liable in this form of action. The learned Judge was inclined to be of that opinion, and it was then contended for the plaintiff that an entry was not necessary. The learned Judge, however, nonsuited the plaintiff, reserving leave to him to move to set that nonsuit aside, and to enter a verdict for him, if the Court should be of a different opinion.

Shee, Serjt., having obtained a rule *nisi* accordingly,

Dowdeswell (*Montagu Chambers* with him) now showed cause :

The only point reserved at the trial was, whether an action for use and occupation under the statute 11 Geo. II. c. 19, s. 14, can be maintained, without an actual entry upon the premises demised. It is perfectly clear upon the *authorities that an entry is necessary to support the action.

[*554]

The Court then called upon

Shee, Serjt., and *Bovill* to support the rule (1) :

An actual entry is not necessary. The 14th section provides that "it shall be lawful for the landlord and landlords, where the agreement is not by deed, to recover a reasonable satisfaction for

(1) They contended in the first instance, that, in point of fact, there had been an entry; but the Court said that point was not open to them.

defendant or defendants, in an action on the case for the use and occupation of what was so held and enjoyed." The defendant here held the premises from the date of the lease; and according to the authority of *Pinero v. Judson* (1), actual occupation is not necessary, but legal possession alone is sufficient, although the rule is different where there is a future demise: *Wooley v. Watling* (2). In the recent case of *Atkins v. Humphrey* (3), TINDAL, Ch. J., in observing upon the language of the 14th section, says, "As far, therefore, as the letter of the Act goes, the words being in the alternative, 'held or enjoyed,' there is no necessity that the land should be occupied as well as held;" and the learned CHIEF JUSTICE proceeds, "One may conceive cases of land taken, but not entered upon: in such a case, there is no reason why the party so taking, inasmuch as he keeps another from the occupation, should not be liable under the statute."

(PARKE, B.: That *dictum* is certainly at variance with the cases of *Nation v. Tozer* (4), and *Edge v. Stafford* (5), in the latter of which it was expressly held that an entry is necessary. The effect of the lease is to create an *interesse termini* in the lessee, but he has nothing in the land until entry; no doubt an action would lie on the agreement, but the statute applies only to cases where there has been *an enjoyment, the words being "held and enjoyed."

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(ALDERSON, B.: The question in *Atkins v. Humphrey* turned upon the meaning of the word "held" upon general demurrer, and that word would of necessity imply an entry.

PARKE, B.: The defendant there could not properly be said to have held the land, unless he had entered upon it, as appears by the language of Mr. Justice BAYLEY in *Edge v. Stafford*.)

It would seem, from the case of *Smith v. Twoart* (6), that an entry is not necessary. ERSKINE, J., there said, "When a party takes premises, and has an opportunity to occupy, the mere fact that he does not occupy them does not deprive the landlord of his remedy by this form of action."

(1) 31 R. R. 388 (6 Bing. 206).

(2) 7 Car. & P. 610.

(3) 69 R. R. 572 (2 C. B. 634).

(4) 1 Cr. M. & B. 172.

(5) 35 R. R. 746 (1 Cr. & J. 391).

(6) 3 Scott, N. R. 172.

(PLATT, B. : It was there held, that there was some evidence for the jury of the defendant's possession.)

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v.
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Where the assignment is to take effect *instante*, the doctrine of *interesse termini* does not arise: *Bellasis v. Burbriche* (1). In *Williams v. Bosanquet* (2), it was held, that when a party takes an assignment of a lease by way of mortgage, the whole interest passes to him, and he becomes liable upon the covenant for payment of rent, though he has never occupied or become possessed in fact.

PARKE, B. :

The only question in the present case which was reserved for discussion by my brother MAULE is, whether the defendant is liable for use and occupation, not having entered upon the demised premises; for I assume that my brother MAULE was satisfied that there was a complete lease for a year to take effect *in presenti*, and also that there was no actual entry; for if it had been questionable whether the facts relied upon by the plaintiff amounted to an entry, a request should have been made to the learned Judge by the plaintiff's counsel, that the question should be left to the jury. But upon the facts of this case we must assume that no entry was proved. Now, I have always considered that *Edge v. Strafford*, followed by other cases, *had laid down the law expressly, that an action for use and occupation could not be maintained until after entry by the lessee. That case was followed by *How v. Kennett* (3), where it was held, that an action for use and occupation cannot be maintained against a trustee to whom the term has been assigned by the termor, unless he has actually occupied; although the assignment be sufficient to vest the term in the trustee, unless he disclaims. LITTLEDALE, J., there says, "I agree with *Mr. Manning* that an assignment at common law charges the assignee with the premises, unless he disclaims. But the question here is, whether an action for use and occupation lies." And then he adds, "Perhaps an action of debt might lie, the declaration stating that the term was assigned to the defendants; but in an action for use and occupation it must be shown that the defendants in fact occupied." The same law is laid down in *Nation v. Tozer*. Against these decisions there is nothing to be found but the *dictum* of TINDAL, Ch. J., in *Atkins v. Humphrey*, which I may observe was unnecessary for

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(1) 1 Ld. Ray. 170.

(3) 3 Ad. & El. 659.

(2) 21 R. R. 585 (1 Brod. & B. 238).

the decision of the case, for the executors there were liable as assignees. The other Judges in that case say nothing of the sort. I have always considered no point of law to be clearer than this—that in actions of debt or covenant on a lease to recover rent, although the declaration usually contains a statement that the lessee had entered, the averment need not be proved; but when the question is, whether the estate has vested, then proof of an actual entry is necessary. The statute may apply to cases in which the relation of landlord and tenant does not exist; but where the case is put, as it is here, on a supposed lease between the parties, it is essential to show that the lessee has entered, before the landlord can maintain an action for use and occupation. The rule, therefore, ought to be discharged.

ALDERSON, B., and PLATT, B., concurred.

Rule discharged.

1850.
Feb. 8.
July 8.

[557]

WILES v. WOODWARD.

(5 Ex. 557—564; S. C. 20 L. J. Ex. 261.)

In trover for paper, it appeared, that the plaintiff and defendant had been in partnership together as paper manufacturers and iron merchants. The partnership was dissolved by a deed, which recited, that it had been agreed that the business of a paper manufacturer should belong exclusively to the defendant, and the business of an iron merchant to the plaintiff, but that the plaintiff should receive out of the stock, paper to the value of 898*l.* 4*s.* 11*d.*, which should remain in the paper mill for a year, at his option. The deed also recited, that in performance of that arrangement paper to the value of 898*l.* 4*s.* 11*d.* had been delivered to the plaintiff, and the same was then in the mill, as the plaintiff acknowledged. It was then witnessed, that in performance of the arrangement the plaintiff and defendant dissolved partnership, and the plaintiff assigned to the defendant the stock in trade of the business of a paper manufacturer, except the 898*l.* 4*s.* 11*d.* worth of paper so delivered to the plaintiff as aforesaid, and the defendant assigned to the plaintiff the stock in trade of the business of iron merchants: there were also mutual releases. No paper whatever was set apart or delivered to the plaintiff, but the jury found that the defendant had converted the whole stock: Held, first, that the parties were estopped by the deed, to say that no such delivery had taken place; secondly, that as the defendant had converted the whole, the plaintiff might maintain trover for his share of the stock, although no specific portion had been set apart for him.

TROVER for reams of paper. Pleas, Not guilty, and Not possessed.

At the trial before Patteson, J., at the Yorkshire Summer Assizes, 1849, it appeared that the plaintiff and defendant had carried on business in partnership as paper manufacturers and iron

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merchants, and that the partnership was dissolved by a deed, dated the 14th of February, 1844, which, so far as material, is as follows: "Whereas the property belonging to the said Joshua Woodward (the defendant) and William Wiles (the plaintiff), in respect of their partnership in the said businesses, consists of a leasehold paper-mill, called "The Olive Mill," in the chapelry of Bradfield, &c., and of the goodwill, stock in trade, and machinery of the said business of paper manufacturers carried on upon the said premises, and also of book debts due and owing unto the said J. Woodward and W. Wiles in respect thereof, and the leasehold warehouses situate in Joiner Lane, in Sheffield, and of the goodwill, stock in trade, and effects of the business of iron merchants carried on upon the said premises, and also of book debts due unto the said J. Woodward and W. Wiles in respect thereof. And whereas, as part of the arrangement for the said dissolution of partnership, it hath been agreed that the said leasehold paper-mill, and the goodwill, stock in trade, and machinery *of the said business of a paper manufacturer, and also the book debts of, belonging, due, or owing or relating to both the said businesses, shall be taken by and belong exclusively to the said J. Woodward, and that the said leasehold warehouse, and the goodwill, stock in trade, and effects (excepting the book debts) of the said business of an iron merchant, shall be taken by and belong exclusively to the said W. Wiles; but that inasmuch as the property to be so exclusively taken by the said J. Woodward on such dissolution exceeds in value the said property to be so taken by the said W. Wiles exclusively, it was further agreed that the said W. Wiles should receive out of the stock in trade of the said business of a paper manufacturer, paper to the value of 898*l.* 4*s.* 11*d.*, which should remain upon the premises of the said mill for the term of one year or not, at the option of the said W. Wiles, who should pay the excise duty thereon. And whereas it is also intended and agreed, that the said leasehold paper-mill shall be forthwith assigned to, and be absolutely and exclusively vested in, the said J. Woodward, his executors and administrators; and also, that the said leasehold warehouse and premises in Joiner Lane, in Sheffield, aforesaid, whereon the said business of an iron merchant was carried on as aforesaid, shall be forthwith assigned to, and be absolutely and exclusively vested in, the said W. Wiles, his executors, &c.; and whereas, in further performance of the said arrangement, paper to the value of 898*l.* 4*s.* 11*d.* hath been delivered to the said W. Wiles,

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doth hereby acknowledge. Now this indenture witnesseth, that in pursuance and further performance of the said arrangement, they the said J. Woodward and W. Wiles do, and each of them doth, by these presents dissolve, determine, and put an end to the partnership which so formerly subsisted between them the said J. Woodward and W. Wiles, in the said business of paper manufacturers, and also in the said business of iron merchants, and in all dealings and transactions connected with or relating to the said respective businesses *or any of them; and this indenture further witnesseth, that, in pursuance and further performance of the said arrangement, he the said W. Wiles doth, by these presents, assign, release, and transfer unto the said J. Woodward, his executors, &c., all and singular the stock in trade, goods, fixtures, implements, and articles of or belonging to or used in the said trade or business of paper manufacturers, heretofore carried on in co-partnership by the said J. Woodward and W. Wiles (other than and except the said sum of 898*l.* 4*s.* 11*d.* worth of paper so delivered to the said W. Wiles as aforesaid); and also all the goodwill, benefit, and advantage of the said business, and all debts due to them the said J. Woodward and W. Wiles, or either of them, in respect or on account of the said businesses of paper manufacturers and iron merchants respectively (so hitherto carried on in partnership by them); and all books of accounts, invoices, vouchers, and documents relating to the said businesses of paper manufacturers and iron merchants respectively, or to the dealings and transactions of the said J. Woodward and W. Wiles therein, and all the right, title, interest, trust, property, benefit, claim and demand whatsoever or howsoever of him the said W. Wiles, of, in, to, out of, or upon the said stock in trade, goods, effects, goodwill, debts, and premises, hereinbefore assigned and released or intended so to be." The deed contained a similar assignment by J. Woodward to W. Wiles, "of the stock in trade, goods, fixtures, implements, and articles of or belonging to or used in the said trade or business of iron merchants," &c. The deed also contained mutual releases.

No paper whatever was set apart or delivered to the plaintiff, but some of it was sold by the defendant. The plaintiff had demanded the quantity he was entitled to under the deed, and the defendant refused to give him any. The defendant's counsel objected that the action would not lie, inasmuch as no certain

definite quantity of paper belonged to the plaintiff; that either the whole property in it *passed to the defendant, or, if not, it was the joint property of both. It was contended on behalf of the plaintiff, that both parties were estopped by the deed from saying that no such delivery had taken place. The learned Judge left it to the jury to say, whether there was a conversion of the whole of the paper; and the jury having found in the affirmative, his Lordship directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a nonsuit.

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A rule *nisi* having been obtained accordingly—

Martin and *T. Jones* showed cause, in last Hilary vacation (Feb. 8) :

The recital in the deed, that paper to the value of 898*l.* 4*s.* 11*d.* has been delivered to the plaintiff, is an estoppel between the parties. The plaintiff could not have sued on the deed for a breach of covenant in not delivering the paper, for he is estopped by the recital from saying that no delivery has taken place.

(PARKE, B. : An estoppel is not binding in an action founded on a matter collateral to the deed : *Carpenter v. Buller* (1).

This case falls within the principle of the decisions, that where a party, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, the former is concluded from averring against the latter that a different state of things existed at the time : *Pickard v. Sears* (2), *Freeman v. Cooke* (3). Here both parties have agreed upon a given state of circumstances, and the plaintiff has a right, as against the defendant, to treat the paper as actually delivered. Where the defendant, a wharfinger, had accepted, without restriction, a delivery order for twenty sacks of flour, given to the plaintiff by a person from whom he had purchased them, that was held an admission that the defendant had twenty sacks which he would appropriate to that order : *Gillett v. Hill* (4). This deed does not create a joint tenancy, or a tenancy in *common in the paper, but it is an agreement between the parties, that a portion of the paper has become the property of the plaintiff; and the refusal to deliver any paper whatever was evidence of a conversion, although none in particular was set apart.

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(1) 58 R. R. 680 (8 M. & W. 209).

(2) 45 R. R. 538 (6 Ad. & El. 469).

(3) 76 R. R. 711 (2 Ex. 654).

(4) 39 R. R. 833 (2 Cr. & M. 530).

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(PARKE, B.: In a contract of sale the parties must agree on the specific goods, otherwise no property passes. Thus, in *White v. Wilks* (1), where the agreement was for the sale of twenty tons of oil in the vendor's cisterns, and in point of fact the vendor had many cisterns with more than twenty tons in them: Sir J. MANSFIELD ruled that no property passed to the purchaser, because the contract did not attach on any particular portion of the oil; and that ruling was upheld by the Court of Common Pleas. Other authorities are collected in Blackburn on Contract and Sale, p. 123.)

Jackson v. Anderson (2) is identical with the present case. There the plaintiff's agent advised them that he had remitted to them 1,969 dollars, consigned to L. L. received 4,700 dollars, and pledged the bill of lading to the defendant, who received the price of the dollars at the Bank of England, where they were deposited for safe custody, on a sale of them to the Bank; and it was held, that although no specific dollars had been severed for the plaintiffs, yet, as the defendant had converted all the plaintiff's and all his own, trover would lie for the plaintiffs' share. (They also argued that there was evidence of a conversion of the whole of the paper, and the COURT intimated an opinion that there was ample evidence.)

Watson and Pashley, in support of the rule:

It is clear that one joint tenant cannot maintain trover against another, unless there has been a destruction of the chattel: Co. Litt. 323. Now, at the time this deed was executed, the paper was the joint property of the plaintiff and defendant, and no severance has ever taken place. In order to *divest the joint property, it was necessary that there should be an appropriation of a specific portion to the plaintiff: *Wait v. Baker* (3), *Laidler v. Burlinson* (4). If half of the paper had been accidentally burnt, on whom would the loss fall? Or, suppose it were stolen, how would the property be laid in an indictment? There is no estoppel, for this is a claim collateral to the deed; and even if it were not, numerous authorities establish that estoppels by deed in order to be binding must be pleaded, if there has been an opportunity, otherwise the matter is at large: *Doe v. Huddart* (5), *Doe d. Strode*

(1) 14 R. R. 735 (5 Taunt. 176).

(2) 4 Taunt. 24.

(3) 76 R. R. 469 (2 Ex. 1).

(4) 46 R. R. 717 (2 M. & W. 602).

(5) 2 Cr. M. & R. 316.

v. Seaton (1), *Treviban v. Lawrence* (2), *Magrath v. Hardy* (3), *Doe v. Wright* (4), *Sanderson v. Collman* (5), *Vooght v. Winch* (6).

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(PARKE, B., referred to *Armstrong v. Norton* (7), *Doe v. Wellsman* (8).)

The doctrine laid down in *Pickard v. Sears* (9), and which is explained in *Freeman v. Cooke* (10), has no application here; for this is not the case of a wilful misrepresentation by one person, whereby another is induced to alter his position, but it is a recital by deed of a fact false to the knowledge of both parties. (They also referred to the 2 & 8 Vict. c. 28.)

Cur. adv. vult.

The judgment of the COURT was now delivered by—

PARKE, B. :

The principal question involved in this case is one of some nicety. The plaintiff brought an action of trover for a quantity of paper; there were the pleas of "Not guilty" and "Not possessed." It appeared on the trial, before my brother Patteson, at York, that the plaintiff and *defendant had been in partnership together, as paper makers and iron merchants, and that the partnership was dissolved by a deed on the 14th of February, 1844, by which it was recited, that an agreement had been made that the defendant should have all the stock in trade of the business of paper merchants, but that the plaintiff should receive paper out of that stock to the value of 898*l.* 4*s.* 11*d.*, which was to remain in the paper-mill for a year. On the other hand, the plaintiff was to have all the stock in trade in the iron business. The deed further recited, that, in pursuance of that arrangement, paper of that value had been actually delivered to the plaintiff, and that the same then was in the paper-mill, as the plaintiff acknowledged. The deed then contains an assignment by the defendant to the plaintiff of all the stock in trade in the iron business, and by the plaintiff to the defendant, of all the stock in trade in the paper-making business, except the 898*l.* 4*s.* 11*d.* worth of paper delivered to the plaintiff; and mutual releases, and a dissolution of the old partnership.

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(1) 41 R. R. 831 (2 Cr. M. & R. 728).

(2) 2 Ld. Ray. 1048; S. C. 1 Salk. 276.

(3) 44 R. R. 861 (4 Bing. N. C. 782).

(4) 50 R. R. 534 (10 Ad. & El. 763).

(5) 4 Man. & G. 209.

(6) 21 R. R. 406 (2 B. & Ald. 662).

(7) 2 Ir. L. Rep. 96.

(8) 2 Ex. 368.

(9) 45 R. R. 538 (6 Ad. & El. 469).

(10) 76 R. R. 711 (2 Ex. 654).

WOODWARD. was set apart or delivered to the plaintiff; and the counsel for the defendant, on the trial, contended, therefore, that the plaintiff could not maintain an action of trover, as no certain definite quantity of paper belonged to him; that, as all the paper was assigned to the defendant by the plaintiff except that delivered to the plaintiff, the whole was the defendant's; and if not, that it was still the joint property of both, and therefore no action of trover could be maintained by the plaintiff, being one joint tenant, against the defendant, who was another. To this it was answered for the plaintiff, that both parties were estopped by the deed to say that no such delivery had taken place to the plaintiff; and this not merely in an action on the deed, but in this proceeding, which it was said was to enforce the rights arising out of it, and not collateral to the deed. And we think that this was the position of the parties.

[*564] A recital, *when it is of a fact agreed upon by both, binds both, as was held in *Carpenter v. Buller* (1) and in *Young v. Raincock* (2), *Stroughill v. Buck* (3); and the present claim is not collateral to the deed, as was the case in *Carpenter v. Buller*. It is, therefore, an estoppel on both. The parties have agreed with respect to the stock in trade in the paper business, that they should stand precisely in the same situation as if the stock had been divided, and part to the stipulated amount delivered to the plaintiff; and being in that situation, the question is what their respective rights are.

If there had been a conversion of part only by the defendant, it would have been impossible, notwithstanding that agreement, to have said that the particular portion mentioned in the declaration was set apart for the plaintiff, and the plaintiff could not have recovered; he would have been in the same position as if, after the paper had been delivered, he had so confused it with the rest of the stock of paper as to make it impossible to ascertain it, and he could not have recovered for that conversion; but if the whole of the paper is converted the same difficulty does not arise, for there the part belonging to the plaintiff, whatever it is, must have been converted. Now, in the present case, we have before intimated our opinion that there was evidence of a conversion by the defendant of the whole stock of paper; the jury have found that conversion, and we think the plaintiff is therefore entitled to his verdict.

Rule discharged.

(1) 58 R. R. 680 (8 M. & W. 209).

(3) 80 R. R. 395 (14 Q. B. 781).

(2) 78 R. R. 652 (7 C. B. 310).

FRIAR *v.* GREY AND OTHERS (1).

(5 Ex. 584—600; S. C. 19 L. J. Ex. 368; 15 Jur. 814.)

1850.
June 5, 8,
July 8.

[584]

The plaintiff demised to the defendant a coal mine for forty-two years, at a certain yearly rent. The lease contained numerous covenants on the part of the lessee for payment of rent, and in respect of the working of the mine, &c., with a proviso for re-entry on breach of any of them; and also a proviso, that if the lessees should be desirous to quit the premises at the end of the first eight years of the term, and of such their desire should give the lessor notice in writing eighteen calendar months before the expiration of such eighth year, then, all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessee having been observed and performed, the lease should, at the expiration of the eighth year, be utterly void; but, nevertheless, without prejudice to any claim or remedy which any of the parties might then be entitled to for breach of any of the covenants: Held, in the Exchequer Chamber (2) (reversing the judgment of the Court of Exchequer), that the performance of all the covenants by the lessee was a condition precedent to his right to determine the lease.

COVENANT on an indenture of lease, by the devisee of the reversion against the lessees. Breach, non-payment of rent.

The plea commenced by setting out on *oyer* the indenture, whereby John Friar, the plaintiff's testator, demised to the defendants a certain "colliery, coal mine, and seam and seams of coal, as well opened as not opened," with liberty to dig pits, shafts, &c.; "and also a certain tenement or farmhold, with the fields, closes, and parcels of ground enjoyed therewith," for a term of forty-two years, "yielding and paying unto J. Friar, his heirs and assigns, for and in respect of the colliery, coal mines, seam and seams of coal, liberties and privileges, yearly and every year, during the continuance of the said term, the rent or sum of 260*l.*, for the yearly number of 134,588 bolls (each boll to contain twenty-four Imperial gallons), of coal, to be wrought and gotten forth and out of the said colliery and coal mines, and there vended or removed from and out of the hereditaments hereby demised, the said yearly rent of 280*l.*, to be paid whether such number or quantity of coal be yearly wrought and gotten forth or out of the said colliery and coal mines, and there vended or thence removed as aforesaid, or not; and also yielding and paying unto J. Friar, his heirs, &c., in respect thereof, over and above the yearly rent of 280*l.*, a further rent or sum of money for each and every boll of coal which shall be had and obtained out of the said pits and mines, and there vended or *thence removed, over and above the annual quantity

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(1) Cited in *Bastin v. Bidwell* (1881)
18 Ch. D. 238, 44 L. T. 742.—J. G. P.
(2) The judgment of the Exchequer

Chamber was affirmed in the House
of Lords. See 4 H. L. C. 565.—
J. G. P.

for 130,208 bolls; and also yielding and paying for or in respect of the said tenement or farmhold and lands, and other the premises hereby demised, yearly and every year, during the continuance of the said term of forty-two years, unto J. Friar, his heirs, &c., the rent or sum of 51*l.*; the several and respective rents hereinbefore reserved and made payable, to be paid at two days or times in the year (that is to say), the 11th of November and the 12th of May, in each year," &c.; "and it is hereby declared and mutually agreed by and amongst the parties hereto, that if the quantity of coals wrought in the said colliery and coal mines by the said lessees, their executors, &c., shall, in any year, fall short of or be less than the quantity specified to be wrought in each year for or in respect of the said rent of 280*l.*, then it shall be lawful for the lessees, their executors, &c., to make up the deficiency within three years next after such deficiency shall happen, but not after the end or other sooner determination of the term hereby granted, on any account whatever." Then followed affirmative and negative covenants on the part of the lessees, in respect of the several matters mentioned in the following proviso: "Provided always, and it is hereby declared and agreed between the parties hereto, that if the said several rents or sums of money hereby reserved or made payable, or any of them or any part thereof respectively, shall be in arrear and unpaid for the space of forty days next after the said days or times of payment; or if the lessees, their executors, &c., shall refuse or neglect to make and pay unto J. Friar, his heirs, &c., or their tenants or farmers, for the time being, all and every or any sum or sums of money which shall be adjudged or awarded to be paid to him or them for damage, for the exercise of any of the powers and liberties hereby granted; or shall neglect or refuse to obey or perform any award which shall be made of or concerning
*any other cause, matter, or thing, under or pursuant to the clause or provision for arbitration hereinafter contained; or if the said lessees, their executors, &c., shall neglect to fill up such pits as shall not be needed for air, or water-courses, or drawing coal; or shall neglect to carry on and manage the said colliery and lands in the manner hereinbefore specified; or shall not leave good and sufficient walls and pillars of coal, as well to support the roof and remaining part of the seam as to prevent any creep or thrust coming in upon the said colliery; or shall do or suffer to be done any neglect or wilful matter or thing, whereby the same may be

drowned or overburdened with water or sythe, or whereby any creep or thrust may be brought thereon, or the same may be otherwise damnified; or shall not leave a barrier of twenty yards against the adjoining collieries, unless authorised as aforesaid to do otherwise: or shall work or win any coal or otherwise disturb the strata underneath the site of any of the said dwelling-houses, offices, or other buildings, or underneath any part of the said land, situate within twenty yards from any such site; or shall at any time neglect or refuse, after having been thereunto required, to give and present to the said J. Friar, his heirs, or assigns, or his or their agent or agents, such monthly account of the quantities of coal wrought and won as aforesaid; or shall hinder or obstruct the said J. Friar, his heirs, &c., from perusing, inspecting, or examining the overseer's book of presentments, or from measuring or gauging the corves, tubs, or baskets, as aforesaid, or from entering, viewing, and inspecting the said colliery; or shall not keep and maintain in such repair as aforesaid, all and every the houses, buildings, erections, water-levels, drains, water-courses, and other matters and things belonging to the said premises; or shall at any time or times demise, assign, or otherwise dispose of or part with the possession of the said colliery, coal mines, lands, and premises, or any part thereof, or do, commit, or suffer any act whereby the *same, or any part thereof, may be assigned or otherwise disposed of, or the possession thereof parted with to any other person or persons whomsoever (save only as regards such partnership as hereinbefore is excepted), without such express licence and consent for that purpose as hereinbefore is required; or shall enter into partnership with any other person or persons in the said colliery or coal mines (save as aforesaid); or shall neglect or omit to manage and cultivate the said lands hereby demised in the manner hereinbefore appointed and laid down; or shall obstruct and prevent the said J. Friar, his heirs, &c., from making trials towards or for the purpose of a future provision for working of coal in manner hereinbefore expressed; or if the said lessees, or the survivors or survivor of them, or the persons or person whomsoever in whom this present lease shall be beneficially vested for the time being, shall become and be adjudged bankrupts or bankrupt within the laws concerning bankruptcy: then, and in any or either of the said cases, the covenant for quiet enjoyment hereinafter contained shall cease and be void, and it shall and will be lawful for the said J. Friar, his heirs or assigns, at any time thereafter to enter into

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and upon the said colliery, lands, mines, and other premises hereby demised, or any part thereof in the name of the whole, and the same to have again, re-possess, and re-enjoy as of his or their former estate, right, and interest, anything herein contained to the contrary thereof notwithstanding; and then also, and in any or either of the said cases, it shall be lawful for the said J. Friar, his heirs, &c., to enter into and upon all or any part of the said premises, and there seize, have, and take possession of all or any of the engines, bands, ropes, tackle, utensils, railways, goods, chattels, and effects used and employed in carrying on the said colliery, and to put out and remove the said lessees, their executors, &c., from the possession thereof, and to sell and dispose of the said goods, chattels, effects, and premises, in and towards the payment *of all or any of the said respective rents which may be in arrear. Provided also, that if the said lessees, their executors or administrators shall be desirous to quit the said premises hereby demised at the end of the first eight years of the said term, or at the end of the first or any subsequent three years after the expiration of the said eight years, and of such their desire shall give to the said J. Friar, his heirs or assigns, notice in writing eighteen calendar months before the expiration of such eighth year, and thereafter before the expiration of any such three years (as the case may be), then and in such case (all arrears of rent being paid), and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed, this lease, and every clause and thing herein contained, shall, at the expiration of the first eighth year, and thereafter at the expiration of any such third year, (whichever in the said notice shall be expressed,) cease, determine, and be utterly void, to all intents and purposes, in like manner as if the whole of the said term of forty-two years had then run out and expired: but nevertheless without prejudice to any claim or remedy which any of the parties hereto or their respective representatives may then be entitled to for breach of any of the covenants or agreements hereinbefore contained." Then followed a covenant for quiet enjoyment, the lessees paying the rents and performing the covenants. "And further that it shall and may be lawful to and for the lessees, their executors, &c., at any time or times within the space of six calendar months next after the expiration or other sooner determination of the term hereby granted or demised, to lead, take, and carry away all and every such quantities of coal as shall have

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been brought and gotten out of the said colliery and coal mines, and laid above ground, and be then remaining at any of the pits: Provided that the said lessees, their executors, &c., shall and do in the first place well and truly pay and satisfy all such rents as shall be then in arrear and *unpaid. And further, that it shall and may be lawful to and for the lessees, their executors, &c., (paying the rents and performing the covenants as aforesaid,) in the harvest time next after the end and expiration of the said term, peaceably and quietly to have, cut down, reap, and carry away the way-going crop of corn or grain by them sown upon thirty-four acres and no more of the lands, which, according to the covenants hereinbefore contained and the true intent and meaning of these presents, shall then be in ploughing or tillage, and that they shall have the use of the stack, garth, barn, and granary, and also of one cottage belonging to the said premises, until the 12th day of May next after the determination of this demise." There was also a covenant for reference to arbitration of disputes concerning any covenant, clause, word, matter, or thing therein contained.

The plea then stated, that the whole of the rent in the declaration alleged to have become due and payable, was due and payable, and the supposed breaches of covenant in the declaration mentioned respectively arose and happened after the 12th of May, 1846, and after the expiration of the first eight years of the said term, and after the said lease and every clause and thing therein contained had ceased, determined, and become void, as hereinafter mentioned. And the defendants further say, that after the making of the said indenture, and after the death of the said J. Friar, and after the plaintiff became so seised as aforesaid, and eighteen calendar months before the expiration of the first eight years of the said term, to wit, on &c., the defendants, being desirous to quit the said demised premises at the end of the first eight years of the said term, gave to the plaintiff notice in writing of such their desire, and thereby gave the plaintiff notice that they would quit and deliver up possession of the said demised premises on the 12th of May, 1846, being the end of the first eight years of the said term. That at the expiration of those eight years, all arrears of the *said rents so reserved and made payable by the said indenture having been paid, and all and singular the covenants and agreements in the said indenture contained on the part of the defendants having been duly observed and performed at the expiration of the said first eighth year of the said term (and which happened before the

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thing therein contained ceased, determined, and were utterly void, to all intents and purposes, in like manner as if the whole of the said term of forty-two years had then run out and expired, according to the said indenture and the said proviso in that behalf so therein contained as aforesaid. Verification.

Replication. That all and singular the covenants and agreements in the said indenture contained on the part of the defendants had not been and were not duly observed and performed at the expiration of the said first eighth year, *modo et formâ*; but on the contrary thereof the plaintiff saith, that after the making of the said indenture, and during the term thereby granted, and before the expiration of the first eight years of the term, and after the plaintiff became so seised as aforesaid, to wit, on &c., and on divers other days and times afterwards and before the expiration of the first eight years of the said term, the defendants wilfully and negligently omitted to draw and pump out of the said colliery and coal mines divers large quantities of water, which during and on each of those days and times was standing, remaining, and being therein, and which they then might and ought to have drawn and pumped thereout; and by reason and in consequence of such neglect and omission, the said collieries and coal mines then became and were drowned and overburthened with water from waters in the said colliery, contrary to the said indenture and the covenant of the defendants in that behalf; and that, at the expiration of the first eight years of the said term, the last-mentioned breach of covenant was still subsisting and continuing. Verification.

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Demurrer (1), and joinder therein.

Hugh Hill argued in support of the demurrer (June 5 and 8) :

The question is, whether the performance of the covenants on the part of the lessees constitutes a condition precedent to their right to determine the lease; and it is submitted that it does not. In the case of *Friar v. Grey* (2), the same point was discussed in the Court of Queen's Bench, who held that the performance of the covenants was a condition precedent; but that judgment was reversed by the Court of Exchequer Chamber, *Grey v. Friar* (3); and, although their decision proceeded on the ground that the

(1) The defendants demurred specially, but the argument and judgment proceeded on the general ground.

(2) 15 Q. B. 891.

(3) 15 Q. B. 901.

replication was bad, yet on this point also they expressed a strong opinion at variance with that of the Court of Queen's Bench. The question is one of construction, and the intention of the parties must be collected from the contract itself. The proviso immediately preceding explains this. It could hardly be argued that any breach of covenant, however trifling, would entitle the lessor to re-enter; but according to the plaintiff's construction, the slightest breach would prevent the lessees from determining the lease. Such a construction would be productive of the greatest inconvenience in leases like the present, which, of necessity, contain very numerous and minute covenants.

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(ALDERSON, B.: The words "all arrears of rent being paid" contemplate some breach of covenant.)

The case of *Porter v. Shephard* (1), which is relied upon by the plaintiff, is distinguishable from the present case; there the lease contained a proviso, that the lessee might determine the term at the end of the first three or five years, giving six months previous notice, and that then, "from and after the expiration of the first three or five years, and payment of all rents and arrears of *rent and duties on the tenant's part to be paid, and performance of the covenants contained on the part of the lessee, the indenture and every clause therein should cease and be utterly void." The ground of that decision was, that the words "from and after" created a condition precedent; and that, if it were not so, the landlord would be left without remedy for existing breaches of covenant, inasmuch as the stipulation was that, after the expiration of the notice, the lease should be void. Here the words used are, "all arrears of rent being paid," &c.; and there is an express reservation of any claim or remedy which either party may be entitled to for breach of any covenant. The words "from and after" indicate an intention to create a condition precedent: Roll. Abridg. "Condition" (T.), pl. 11; Com. Dig. "Condition" (B. 1); Shep. Touch. 122; but the words "paying rent" do not make a covenant conditional: *Hays v. Bickerstaffe* (2), *Warren v. Asters* (3), *Allen v. Babbington* (4), *Dawson v. Dyer* (5). That distinction seems to have been understood by the parties; for whenever they meant to create a condition precedent apt words are used. No effect can be given to the latter

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(1) 3 B. R. 305 (6 T. R. 665).

(4) Sid. 280.

(2) 2 Mod. 34.

(5) 39 B. R. 566 (5 B. & Ad. 584).

(3) Sir T. Jones, 205.

for breaches of covenant existing at the end of the term. It will be argued, that its object was to preserve the lessor's right of suing for breaches which he would otherwise waive by accepting the notice; but a contract under seal cannot be waived by matter *in pais*: *Thompson v. Brown* (1), *Little v. Holland* (2), *Leslie v. De La Torre* (3). Therefore, if this be construed as a condition precedent, the lessor could not sue in respect of breaches of covenant existing at the time the lease was put an end to; for it would be necessary to allege in the declaration either that the condition had been *performed or waived. The stipulations, that, after the determination of the term, the lessees shall be at liberty to carry away coal wrought, and to reap the way-going crop, and that they shall have the use of the farm, &c., (paying the rents and performing the covenants,) show that the parties contemplated some covenants of which there would be breaches when the lease was determined. The reservation of the rent is similar to that in the case of *The Marquis of Bute v. Thompson* (4), and the proviso was no doubt inserted for the purpose of enabling the lessees to determine the lease if the coal was exhausted.

Manisty, contra :

The doctrine applicable to covenants has no relation to this proviso, which is a power dependent on a condition for the lessees to determine a term absolute in the first instance for forty-two years. The language of the proviso is consistent with the intention of the parties; but in order to give effect to the defendants' construction, the Court must strike out the words "all arrears of rent being paid," &c. The proviso next preceding the one in question empowers the lessor to re-enter upon breach of any of the covenants, and on the other hand the performance of each and every covenant is a condition precedent to the lessees' right to determine the lease. The cases relied on by the defendants proceed on the principle, that the covenants go only to a part of the consideration, and that is different from a power dependent on a condition. In the latter case, there is no instance in which the words "having been performed" have not constituted a condition precedent. A proviso or power in discharge of a liability is always construed strictly: *Marshall v. Powell* (5). The true doctrine as to the effect

(1) 7 Taunt. 656.

(2) 3 T. R. 590.

(3) Cited in *White v. Parkin*, 11

R. R. 488 (12 East, 583).

(4) 67 R. R. 688 (13 M. & W. 487)

(5) 9 Q. B. 779.

of the words "provided always," is found in *Simpson v. Titterell* (1), where PERIAM, J., said, "Proviso always implieth a condition, if there be not words subsequent which *may peradventure change it into a covenant, as where there is another penalty annexed to it for non-performance, as *Dockwray's* case, 27 Hen. VIII. pl. 14. But it is a rule in provisos, that where the proviso is, that the lessee shall perform or not perform a thing, and no penalty to it, this is a condition, otherwise it is void; but if a penalty is annexed *aliter est*, to which the rest of the justices agreed." Covenants which go to the whole of the consideration have always been held to be conditions precedent: *Ritchie v. Atkinson* (2), *The Duke of St. Albans v. Shore* (3), *Stavers v. Curling* (4). In *Porter v. Shephard* (5) the covenants were as minute as in the present case; and there is no real difference between the words "from and after," there used, and "but nevertheless" as in this proviso. The Court will so read those words as to give effect to the proviso: *Walker v. Giles* (6). Perhaps that latter clause was introduced *pro majore cautela*; or possibly its object was to preserve the lessor's right to sue for breaches of covenant not known to him at the time he took possession. It is true, that a person who seeks to enforce a covenant subject to the performance on his part of a condition precedent, cannot aver that such condition was discharged by parol; but there is no authority for saying that a person in whose favour there is a condition precedent may not waive it. Here the lessor might accept the notice and determine the lease by taking possession, although the covenants were not performed. If, when the notice expired, the lessees satisfied all the lessor's claims in respect of the covenants, that would be a performance within the terms of the proviso. Should any question then arise, there is a stipulation by which the lessees could require it to be determined by arbitration.

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Hugh Hill, in reply, referred to *Dawson v. Dyer* (7).

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Cur. adv. vult.

The judgment of the COURT was now delivered by

ROLFE, B.:

The question in this case arose on a demurrer to the replication.

(1) Cro. Eliz. 242.

355).

(2) 10 R. R. 307 (10 East, 295).

(5) 3 R. R. 305 (6 T. R. 665).

(3) 1 H. Bl. 270.

(6) 77 R. R. 425 (6 C. B. 662).

(4) 43 R. R. 682 (3 Bing. N. C.

(7) 39 R. R. 566 (5 B. & Ad. 584).

the payment of rent and performance of all the covenants are, according to the true construction of this lease, a condition precedent to the tenant's right of determining it at the end of the first eight years. Now, but for the words at the end of the proviso in question, "nevertheless without prejudice, &c.," we should not have hesitated to treat the performance of all covenants as a condition precedent to the tenants' right of putting an end to the term. Indeed, the case would then have been undistinguishable from *Porter v. Shephard*. But the words to which we have just referred, and which did not occur in *Porter v. Shephard*, appear to us materially to vary the case. To hold that the literal performance of every covenant is a condition precedent to the right given to the tenant to put an end to his term, will practically be, in almost every case of mining leases, to render the exercise of that right impossible. It can rarely happen that in a lease of this description some covenant should not, at some time or other, have been broken. Still, if the language of the lease is unambiguous, and the strict and literal performance of every covenant is made a condition precedent to the right given to the tenant, we are not at liberty to give to the instrument a sense different from what its language imports, and to say that the parties could not have meant what they have said. But the extreme inconvenience of a particular construction may well justify us in looking at all the accompanying language, in order to discover, if it be possible, expressions which may warrant an inference that the words leading to the inconvenience were *not intended by the parties in their natural and obvious sense; and in this case we think that the words to which we have already alluded do enable us to say, that the performance of all the covenants could not have been intended by the parties to be a condition precedent to the right of determining the lease, for if that had been the meaning, the reservation of a right to sue on any broken covenants would have been absurd.

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We do not go further into the question, for the very point has already been twice discussed on this very case, once in the Court of Queen's Bench, and once on writ of error to the Exchequer Chamber, not indeed on the present record, but in an action for previous arrears of rent. In that case the Court of Queen's Bench held the condition to be a condition precedent, and gave judgment for the plaintiff. That judgment was reversed in the Exchequer Chamber, on the ground of a defect in the mode of pleading, which defect

does not exist in the case before us. The reversal, therefore, does not govern the present case. But the court of error, though it proceeded on the defective mode of pleading, yet expressed also a strong opinion that there was no condition precedent, relying on the qualifying words to which we have alluded. The case, therefore, is not strictly governed by authority as to either mode of construction. We have, on the one hand, a decision of the Court of Queen's Bench; but that decision, having been reversed, though on another point, can be treated as no more than an extrajudicial expression of opinion, entitled certainly to great weight, but not as decisive. On the other hand, there is the unanimous judgment of the Exchequer Chamber, expressing a strong opinion, but also, under the circumstances, extrajudicial, the other way. With this latter opinion we coincide, and must, therefore, give our judgment for the defendants, leaving it to the plaintiff to carry the case, if he shall be advised so to do, to the court of error.

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Judgment for the defendants.

IN THE EXCHEQUER CHAMBER.

A WRIT of error having been brought upon the above judgment in the Exchequer Chamber, it was argued in the Vacation sittings after Easter Term, 1851 (May 16) (1), by *Manisty* for the plaintiff in error, and by *Hugh Hill* for the defendants in error. The plaintiff's point for argument was, "that observance and performance of the covenants and agreements of the lessees were a condition precedent to their power to determine the lease." The arguments were in substance the same as in the Court below. The following additional cases were cited: *Bootle v. Blundell* (2), *Grover v. Burningham* (3), *Bengough v. Edridge* (4), *Kemble v. Farren* (5), *Horner v. Flintoff* (6), *Heard v. Wadham* (7), and *West v. Blakeway* (8).

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The COURT said that they would call upon *Manisty* to reply, if they should think it necessary to hear any further argument for the plaintiff in error; but he was not called upon.

Cur. adv. vult.

(1) Before Patteson, J., Maule, J., Wightman, J., Erle, J., and Williams, J.

(2) 15 R. R. 93 (19 Ves. 321).

(3) 5 Ex. 184.

(4) 36 R. R. 128 (1 Sim. 173).

(5) 31 R. R. 366 (6 Bing. 141).

(6) 60 R. R. 866 (9 M. & W. 678).

(7) 1 East, 619.

(8) 58 R. R. 563 (2 Man. & G. 729).

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Thirdly. The clause applies to both parties, lessees as well as lessor, so that it preserves the right of the lessees to sue the lessor for breaches of covenant, if any, though they have themselves, by their own act, determined the lease.

All these views of the latter clause enable the Court to give effect to the words of that clause consistently with the construction of the former as a condition precedent, and so all the words are made to have some effect; whereas, by a different construction, as we have already observed, the words in the former part of the proviso would in effect be struck out.

For these reasons, we are of opinion that the proviso must be construed as containing a condition precedent, and that the judgment of the Court below must be reversed.

Judgment reversed.

IN THE COURT OF EXCHEQUER.

HANSLIP v. PADWICK.

(5 Ex. 615—624; S. C. 19 L. J. Ex. 372.)

1850.
June 28.
July 8

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Covenant on an agreement made the 27th September, 1848, whereby the defendant agreed to demise to the plaintiff, on or before the 29th November then next, a ferry and certain messuages and premises, at yearly rents; and the defendant thereby agreed, within fourteen days from the date thereof, to furnish an abstract of his title to the several premises, and deduce a good title thereto; and the plaintiff agreed to pay to the defendant, on or before the 29th November, 3,150*l.* and interest. Averment, that the plaintiff was always ready and willing to perform all things in the agreement on his part to be performed. Breach, that the defendant did not within fourteen days, or at any time, deduce a good title. Pleas, that the plaintiff was not ready and willing to perform all things on his part to be performed; and that the defendant did deduce a good title. It appeared that, on the 17th September, 1850, the plaintiff, who was a solicitor and the promoter of a Company, for making a ferry, erecting gas-works, bathing-houses, &c., at Hayling Island, entered into an agreement with the defendant, the owner of land there, for a demise to the plaintiff of a ferry, land, houses, and premises; and the defendant agreed, within fourteen days from the date thereof, to furnish an abstract of his title to the premises, and deduce a good title thereto; and the plaintiff agreed to pay the defendant, on or before the 29th November, 3,150*l.* After the agreement, the Company was provisionally registered by the plaintiff as its promoter. Two abstracts of title were sent by the defendant to the plaintiff, which being objected to, on the 10th November the defendant sent a further abstract, which disclosed a mortgage of the premises intended to be demised to the trustees of the defendant's marriage settlement, one of whom was imbecile: there were also two judgments entered up against the defendant. In consequence of these objections to the title, the association could not proceed with its objects, and was finally dissolved.

Porter v. Shephard, decided first by the Court *of Common Pleas, and afterwards by the Court of King's Bench on error, is directly in point, though the learned counsel for the defendants in error attempted to distinguish it by reason of the words "from and after" which are found in that case; but those words really make no difference in the sense of the proviso.

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The multiplicity and minuteness of the covenants on the part of the lessees was urged to show the improbability of the parties meaning that any the slightest breach of them should deprive the lessees of the benefit of this proviso, and the inconvenience of such a construction in regard to similar leases was also urged. But these reasons do not justify the Court in refusing to put such construction on the words as they plainly require, and in effect rejecting them altogether, which we must do if we hold them not to be a condition precedent. Again, it is by no means clear that every minute breach of the covenants would deprive the lessees of the benefit of the proviso, for there are clauses respecting reference to arbitration which, if complied with, might well be held to be a due observance and performance of the covenants within the meaning of this proviso. But it is said that the latter clause is inconsistent with the construction of the former as a condition precedent, for that it manifestly contemplates that the lease might be determined, notwithstanding existing breaches of covenant on the part of the lessees, whereas, if it could only be determined in case all the covenants were duly observed and performed, no such breaches could exist, and yet the lease be determined.

There are many answers to this argument.

First. It might happen that the lessor was ignorant of the existence of breaches of covenant till after he had acted on the notice to determine the lease, and taken possession of the mines at the expiration of it; and the clause may have been inserted for greater caution, to enable him to recover for such breaches so subsequently discovered; and the *clause may apply to other remedies than by action, such as re-entry and distress.

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Secondly. The clause might apply where the lessor had waived the condition precedent by accepting the notice and taking possession, although he might be aware of some breaches of covenant. For we do not think the argument sound, that although a deed would be necessary to do away with the condition precedent, as such, before breach, therefore that after breach the lessor might not waive the condition without deed.

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Thirdly. The clause applies to both parties, lessees as well as lessor, so that it preserves the right of the lessees to sue the lessor for breaches of covenant, if any, though they have themselves, by their own act, determined the lease.

All these views of the latter clause enable the Court to give effect to the words of that clause consistently with the construction of the former as a condition precedent, and so all the words are made to have some effect; whereas, by a different construction, as we have already observed, the words in the former part of the proviso would in effect be struck out.

For these reasons, we are of opinion that the proviso must be construed as containing a condition precedent, and that the judgment of the COURT below must be reversed.

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The 3,150*l.* was not paid to the defendant: Held, that the plaintiff was entitled to a verdict on the above issues, and to recover as damages the costs of preparing, stamping, and entering into the agreement; the expenses of investigating the title, and endeavouring to procure a good title, and procure the lease to be granted; but not the expenses of raising the 3,150*l.*, and loss of interest; nor the expenses of preparing the Company's deed of settlement, and registering it provisionally, nor the loss of profits from the granting of the lease and the establishment of the association, nor the profits he would have derived from being employed as solicitor by the association, nor as to any advantage which he might have derived from his time, labour, &c., bestowed in the formation of the association.

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COVENANT. The declaration stated, that on the 22nd November, 1847, by a certain agreement then made between the defendant of the one part, and the plaintiff and one J. Borsley of the other part (*profert*), after reciting that it was intended to form a joint-stock association, to be called "The Hayling Island Investment Association," for the purpose of erecting houses and other buildings, and establishing a market, for erecting a pier, enlarging, improving, and conducting and managing the ferry and ferry-house, and making *other public works and improvements, at Hayling Island; and that the defendant was lord of the manor of Hayling, and was also seised to himself and his heirs for an estate of inheritance in fee simple in possession of the ferry and right of ferry and conveyance unto and from the said island across Langston Harbour, and as such lord was also entitled to the collecting of tolls and dues for passengers; and that the parties to the agreement of the second part, in consideration of the defendant entering into the contract and agreement with them thereafter contained, and granting to them or their nominees the lease or leases and privileges thereafter mentioned, were desirous and were determined forthwith, or as soon as conveniently might be, to form the said association, or otherwise to carry into effect the contemplated objects thereof; it was by the said agreement witnessed, and the defendant for himself, his heirs, &c., agreed with the plaintiff and Borsley, their nominees, &c., to enter into an agreement under his hand and seal, whereby the defendant, his heirs, &c., should covenant with the parties to the agreement of the second part, their nominees, &c., to the purport and effect that the defendant would, on or before the 29th September then next, upon the payment to the defendant, his heirs, &c., of 8,250*l.*, grant, demise, and lease to the parties of the second part, for a term of ninety-six years from the 25th December, 1848, the said ferry, and certain messuages and premises, &c., particularly described. The declaration then set out a second

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agreement between the same parties, and of the same date, whereby, after similar recitals, the defendant agreed to demise to the parties of the second part, for the same term, certain parcels of land, situate at South Hayling. The declaration then set out a third agreement, dated the 27th September, 1848, between the defendant of the first part, the plaintiff of the second part, and Borsley of the third part (*profert*), by which, after reciting the above two agreements, and that the defendant and plaintiff had mutually agreed to abandon so much of them as related to certain *messuages, &c., therein mentioned, it was witnessed, that the defendant, for the consideration therein mentioned, agreed that he would, on or before the 29th November then next, demise to the plaintiff, his nominees, &c., the ferry-house and ferry, a certain dwelling-house, a bathing-house, the privilege of erecting a pier, of holding a market, &c., for the term in the first two agreements mentioned, at certain yearly rents and payments. And the defendant, by the third agreement, agreed within fourteen days from the date thereof, to furnish an abstract of his title to the said several premises, and deduce a good title thereto; and for the considerations aforesaid, the plaintiff on his part thereby agreed that he would, in consideration of the covenants and agreements of the defendant therein contained, pay or cause to be paid to him, or his heirs, &c., on or before the 29th of November then next, 3,150*l.*, and interest at 5*l.* per cent. Averments, that the plaintiff was always ready and willing to perform all things in the three agreements mentioned on his part to be performed, and to pay the defendant 3,150*l.* and interest, upon having a good title deduced by the defendant to the premises. Breach, that the defendant did not nor would, within fourteen days from the date of the third agreement, furnish to the plaintiff an abstract of the defendant's title to the said ferry-house, ferry, buildings, messuages, &c., but wholly neglected and refused so to do. The declaration then alleged special damage, in the terms mentioned in the questions as below stated for the opinion of this Court.

Second plea: That the plaintiff was not ready and willing to perform all things to be performed, *modo et formâ*; concluding to the country.

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Third plea: As to so much of the declaration as relates to the defendant's not deducing a good title to the premises in the declaration mentioned—that the defendant did deduce a good title to the premises in the declaration mentioned, *according to

the terms of the said agreement; concluding to the country. Upon which pleas issues were joined.

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The cause came on for trial before Lord Denman, Ch. J., at the Hampshire Summer Assizes, 1849, when a verdict by consent was taken for the plaintiff for the full amount of the damage stated in the declaration, subject to the opinion of the Court upon a case, in substance as follows :

After the making of the third agreement, dated the 27th of September, 1848, the Company was formed, and on the 25th of October, 1848, it was provisionally registered by the plaintiff as its promoter, its purpose being registered to be, "To make a ferry between the Island of Hayling (Hampshire) and Cumberland Fort Point, by means of a floating or other bridge over the creek leading into Langston Harbour. To erect gas-works to supply any part of the island with gas-lights, as may be required. To erect water-works in the island, to supply the inhabitants with fresh water. To purchase lands and buildings by licence from the Board of Trade, where required. To enable members and other persons, by loans or otherwise, to purchase or build houses and buildings, and take lands for building and other purposes at Hayling Island. To erect boarding and bathing-houses and baths. To erect a market; also a quay and piers, and to make other improvements along the esplanade ranging along the front of the sea beach of the said island." In October, 1848, the plaintiff caused to be sent to the defendant a prospectus of the plan and purposes of the association, which prospectus had been prepared some time previously. The prospectus was then submitted to the defendant, who made certain alterations therein, which alterations were not adopted by the plaintiff.

On the 14th October, 1848, the first abstract of title was delivered by the defendant to the plaintiff. This abstract contained the Act of Parliament (6 Geo. IV. c. lxxvii., passed in 1825) enabling the Duke of Norfolk to sell to the defendant, *and stating a compliance

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the trustees of the defendant's marriage settlement of the premises intended to be demised to the plaintiff. The plaintiff laid these further abstracts before counsel, who were still of opinion that the title was not marketable. One of the trustees of the defendant's marriage settlement was imbecile, and it appeared that two judgments had been obtained against the defendant. A long negotiation and correspondence took place, with a view to obviate the objections, in the course of which the defendant declined to apply to the Court of Chancery for a conveyance under the direction of the Court from the imbecile trustee. On the 30th November a meeting of the persons interested in the proposed Company was held, when a resolution was unanimously passed, that the promoters could not proceed with the objects of the association. On the same day the plaintiff gave the defendant notice of this resolution, and that he abandoned the contract, and looked to him for damages. Some further correspondence took place, and on the 1st of December the defendant proposed to pay off the mortgage, but on the 5th of December the Company was finally dissolved, and the provisional registration cancelled.

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Upon the above facts the first question for the opinion of the Court is, whether the plaintiff has or has not established the affirmative of the issue joined upon the second plea of the defendant. The second question is, whether the defendant *has or has not established the affirmative of the issue joined on the third plea of the defendant.

If the Court is of opinion that the plaintiff is entitled to recover, either by reason of his having established the affirmative of the issue joined upon the second plea, and the defendant's having failed to establish the affirmative of the issue joined upon the third plea; or by reason of the insufficiency of the second and third pleas, or either of such pleas, to bar the plaintiff's right of action; or by reason of his having established the affirmative of the issue upon the second plea, or of the defendant's having failed in establishing the issue joined on the third plea, and the insufficiency of the other of such pleas, then the Court is requested and empowered to determine the principles upon which the damages to which the plaintiff is entitled shall be assessed by the Master.

If the Court is of opinion that the plaintiff has not established the affirmative of the issue joined upon the second plea, and that the defendant has established the affirmative of the issue joined upon the third plea, and the Court is also of opinion that the plea

or pleas upon which the plaintiff has failed and the defendant has succeeded, is or are sufficient in law to bar the plaintiff, then a nonsuit is to be entered.

The plaintiff claims, First, the costs and expenses incurred by him in and about the preparing, stamping, and entering into the several agreements mentioned in the declaration.

Secondly, the expenses in and about investigating the alleged title of the defendant to the said premises, and in endeavouring to procure a good title thereto, and to procure the leases to be granted.

Thirdly, his expenses in and about obtaining, raising, and procuring the sum of 3,150*l.* and interest, and loss of interest thereon; which sum was to have been paid to the *defendant on the granting of the said leases at the time specified in the agreements.

Fourthly, his expenses in and about preparing the deed of settlement for the intended association, and making the same public, and which expenses were incurred by him subsequently to the execution of the last-mentioned agreement, and in reliance upon the faithful fulfilment thereof, the contract being, as appears by the said agreements, for the purpose of forming a Joint-stock Company, to be called "The Hayling Island Improvement Association."

Fifthly, the debts incurred and money expended in and about the formation of the association, and incidental thereto, and in registering the same provisionally on the faith of the performance by the defendant of his covenants in the agreements, incurred subsequently to the execution thereof.

Sixthly, the loss of the profits which he would reasonably have derived from the granting of the lease by the defendant and the establishment of the association, and of all profits he would have derived from being employed by the said proposed association to carry out the intended objects thereof as an attorney and solicitor; and all the use, benefit, and advantage which he otherwise might and would have derived from the time, labour, trouble, care, journeys, and attendances by him given, expended, performed, and bestowed in, upon, and about the formation of the association, and in preparing to carry the same and the objects of the agreement into effect.

Butt argued for the plaintiff (June 28th):

The plaintiff is entitled to judgment. The defendant has clearly

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failed to deduce a good title, for his abstract shows that the premises were mortgaged to two trustees, one of whom was imbecile. It is true that, on the 1st of December, the defendant proposed to pay off the mortgage, but he was bound to furnish an abstract and deduce a good title on the 11th of October. Besides, there were two judgments standing *against the defendant, and the concurrence of the judgment creditors to the conveyance was never obtained.

(ALDERSON, B.: There is no distinction in courts of law between matter of title and matter of conveyance.)

Then with respect to the damages, they are to be assessed on the principle that the plaintiff is entitled to be reimbursed for all loss resulting from the defendant's breach of contract.

Shapter for the defendant:

The argument on behalf of the plaintiff confounds the question of title with that of conveyance. The defendant was ready to pay off the mortgage, and to give such a title as a reasonable person would accept. The 11 Geo. IV. & 1 Will. IV. cc. 60, 65, provides for the case of a conveyance by a lunatic mortgagee.

(ROLFE, B.: The fact of the defendant having the power to do something which has not been done, does not remove the objection to the title.)

The question of title is a question of dominion over the estate. In *Shaw v. Rowley* (1), the plaintiff, who had sold shares on which calls were due, and which by the 8 & 9 Vict. c. 16, s. 16, could not be transferred until the calls were paid, was held entitled to recover the price of them, as he was in a condition to make a transfer of them by paying the calls before the purchase-money became due.

(ALDERSON, B.: The title there was not in a third person.)

Stowell v. Robinson (2) decided that the failure to procure from the lessor a licence to assign, or to register previous assignments before the day on which it was agreed to assign and give possession of leasehold premises, was not a breach of the agreement. In *Avarne v. Browne* (3), Sir L. SHADWELL, V.-C., held, "that where an

(1) 73 R. R. 726 (16 M. & W. 810). 928).

(2) 43 R. R. 861 (3 Bing. N. O. (3) 14 Sim. 303.

abstract shows that the equitable title is vested in the vendor, and that the legal estate in fee and a mortgage term are outstanding in certain persons, it shows a good title; and though the owner of the legal estate in fee, or the termor *and the person representing him, may subsequently die, yet that a good title is shown when it is shown that the vendor has the whole equity, and in what person the outstanding portion of the legal estate is vested."

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(ALDERSON, B.: Is there any case at law where, the legal estate being outstanding, it has been held that the abstract showed a good title?)

A court of law takes notice of an equitable interest. In *Tempest v. Kilner* (1), MAULE, J., says, "Suppose a man contracts to assign to another an equitable interest in land, could not the latter maintain an action on that contract?" A contract of this kind must be construed in the same way at law and in equity. The title was complete on the 10th November, when the defendant delivered the last abstract.

(ROLFE, B.: The contract was to deduce a good title on the 11th October.

ALDERSON, B.: At law, time is always of the essence of the contract; in equity, the contract is considered as a purchase of land for money, without reference to the time at which the title is to be made out.)

Then, with respect to the damages, the plaintiff is only entitled to recover such as are immediately consequential. In *De Visme v. De Visme* (2), Lord COTTENHAM, L. C., says, "The purchaser is to have compensation for the loss and injury which he sustained by the non-performance of the contract by the vendors; but they, the vendors, are not therefore to make compensation for any loss not arising out of their contract." In this case, it was no part of the contract that a Company should be formed.

(ROLFE, B.: The plaintiff is proceeding for a breach of contract which took place on the 11th October, and cannot recover for any damages resulting from his endeavours to form the Company after that period.)

Butt replied.

(1) 2 C. B. 300.

(2) 1 Mac. & G. 353.

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ALDERSON, B. :

We have no difficulty as to the way in which the issues should be entered, for the plaintiff is clearly entitled to a verdict upon both. We will take time to consider how the damages are to be assessed. According to my present impression, the plaintiff is entitled only to the two first heads.

Cur. adv. vult.

The judgment of the COURT was now delivered by

ALDERSON, B. :

We intimated at the time of the argument our opinion, that on the facts of this case the plaintiff was entitled to recover ; but we reserved our opinion as to the damages. We have since considered this point, and we think the damages must be confined to the two first heads mentioned in the case, which are these : “ The costs and expenses of the plaintiff, incurred by him in and about preparing, stamping, and entering into the several agreements mentioned in the declaration. The expenses incurred in and about investigating the alleged title of the defendant to the premises, and in endeavouring to procure a good title thereto, and to procure the leases to be granted.” The third, fourth and fifth items are damages incurred by the plaintiff by his own imprudence in beginning to act before he had ascertained whether the defendant could or could not complete his contract ; and the sixth, which is loss of profit, is too remote a subject of damage to be allowed at all under any circumstances like those in this case.

Judgment for the plaintiff accordingly.

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June 21.
July 8.

ARCHER v. BAYNES.

(5 Ex. 625—630 ; S. C. 20 L. J. Ex. 54.)

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The defendant verbally agreed to purchase of the plaintiff certain barrels of flour. The defendant afterwards wrote to the plaintiff, stating, that he had received some barrels, which were not so fine as the sample, and were not the barrels he had bought, and that he would not have them. In answer the plaintiff wrote as follows : “ Annexed you have invoice of the flour sold you last Friday. I am very much astonished at your finding fault with the flour. It was sold to you subject to your examining the bulk ; and it was not until after you had examined it, and satisfied yourself both of quality and condition, that you confirmed the purchase. What was forwarded you was the same you saw. Under these circumstances you cannot, therefore, object to fulfil your agreement.” The defendant

same I saw. I took a sample with me from the sample I have, and the barrels I saw was quite as fine as I compared them with, nor was they lumpy. Now the barrels I have received is all very lumpy, and none of them so fine as the same. If you will take them back and pay charges, I will with pleasure send them. There must be some mistake about them:” Held, that the letters did not constitute a sufficient note or memorandum in writing of the contract within the 17th section of the Statute of Frauds (1).

F.
BAYNES.

ASSUMPSIT for goods sold and delivered. Plea, *Non assumpsit*.

At the trial, before Alderson, B., at the last Liverpool Spring Assizes, it appeared that, in September, 1849, the defendant, who was a flour dealer at Lancaster, verbally agreed to purchase, by sample, of the plaintiff, a corn-merchant at Liverpool, thirty-three barrels of flour, at 21s. 6d. per barrel, to be sent to the defendant at Lancaster by the London and North Western Railway. The flour was accordingly sent, and the plaintiff afterwards received the following letter from the defendant :

“LANCASTER, October 2nd, 1849.

“DEAR SIR,—This is to say that I have received thirty-three R. H. barrels, per London and North Western Railway, but from whom I cannot tell, and have enclosed sample, say No. 1 is of the barrels received, and No. 2 is of the sample I bought the barrels by, by which you will see the barrels is not near as fine as the sample; beside, they are very hard in the barrels. I hope you have not sent them for what I bought, as they are not the barrels I bought, nor shall I have them. Will you please write me per first mail to-morrow about them, and say if you have sent them.
Yours truly, “E. BAYNES.”

“The barrels I saw was not hard, same as what I have received.”

To that the plaintiff replied, inclosing an invoice, as follows :

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“LIVERPOOL, October 3rd, 1849.

“SIR,—Annexed you have invoice of the flour sold you last Friday, and which was forwarded per railway to your address same day, agreeably to your instructions. In reply to your letter of this, or rather last post, I am, I must say, very much astonished at your finding any fault with the flour. It was sold to you, subject to your examining the bulk; and it was not until after you had examined it and satisfied yourself both of quality and condition,

(1) Now s. 4 of the Sale of Goods Act, 1893.—J. G. P.

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that you confirmed the purchase. The flour was in Messrs. Gregg's warehouse when you saw it, and under their care, and their warehouseman says you saw as many barrels as you wished to look at, and that what was forwarded to you was the same as you saw. Under these circumstances, you cannot therefore object to fulfil your agreement; but in order that no unpleasantness may arise out of the transaction, I am satisfied to cancel the sale, provided you will place the flour in the same warehouse here that it was sent from, free of any expense to me; this without prejudice to my claim or any part thereof, and subject to your reply in course.

"I am, Sir, yours respectfully,

"WILLIAM ARCHER."

"LIVERPOOL, 28th September, 1849.

"MR. EDWARD BAYNES.

"Bought of William Archer, payment cash, less three months' interest.

"Thirty-three barrels Ohio flour, at 21s. 6d. per

196 lbs.	£35	9	6
Less 47 lbs. short weight		0	5 2
	<hr/>		
	£35	4	4"

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The defendant wrote in answer as follows :

"LANCASTER, October 10th, 1849.

"DEAR SIR,—This is to say that I duly received yours in reply; beg to say that the barrels I have received is not the same as I saw; I took a sample with me from the sample I have, and the barrels I saw was quite as fine as I compared them, nor was they lumpy. Now the barrels I have received is all very lumpy, and none of them so fine as the sample. Any person you may appoint is at liberty to come and examine them; if you will take them back and pay carriage, I will with pleasure send them. There must be some mistake about them. I cannot tell whatever to do with them.

"Yours truly,

"E. BAYNES."

It was objected, on behalf of the defendant, that there was no sufficient note or memorandum in writing, to satisfy the Statute of Frauds; and the learned Judge, being of that opinion, directed a nonsuit, reserving leave for the plaintiff to move to enter a verdict for the amount claimed. A rule nisi having been obtained accordingly,

Willes and Hugh Hill showed cause (June 21):

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The letters and invoice do not constitute a sufficient note or memorandum in writing of the contract to satisfy the 17th section of the 29 Car. II. c. 3. *Egerton v. Mathews* (1), and *Wain v. Warlters* (2), establish the distinction between the 4th and 17th sections of that statute. By the former, the whole contract must be in writing, including the consideration; but by the latter it is sufficient if all the terms by which the vendee is bound are stated in writing. Now here, though the plaintiff's letter of the 3rd of October, coupled with the invoice, does contain a statement of the terms of a contract, yet that is not adopted by the defendant. A *disclaimer of a contract has never been held to be a memorandum within that statute: *Cooper v. Smith* (3). This case is governed by *Richards v. Porter* (4). * * Where, indeed, the vendee, by his letter in answer, recognises and adopts the terms of a contract specified in the vendor's letter, that, no doubt, is a sufficient memorandum to satisfy the statute: *Jackson v. Lowe* (5), *Smith v. Surman* (6); but that is not the case here.

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Watson and T. Jones, in support of the rule:

It is necessary to keep in view the distinction between the contract itself and the performance of it. The defendant, by his letter of the 10th of October, admits that there was a contract, but complains that the flour sent was not according to sample. The statute does not absolutely exclude parol evidence, and it may be introduced to show that the contract between the parties was that contained in the invoice and letter of the 3rd of October: *Johnson v. Dodgson* (7). The true principle is stated by Lord DENMAN, Ch. J., in *Dobell v. Hutchinson* (8); viz. "that where a contract *in writing, or note, exists, which binds one party, any subsequent note in writing, signed by the other, is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them." *Saunderson v. Jackson* (9) shows that these letters connected together constitute a sufficient note in writing. *Jackson v. Lowe* (5) is not distinguishable from the present case. The parties do not differ as to the terms of the contract, but only

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(1) 8 R. R. 489 (6 East, 307).

(2) 7 R. R. 645 (5 East, 10).

(3) 15 East, 103.

(4) 30 R. R. 392 (6 B. & C. 437).

(5) 25 R. R. 567 (1 Bing. 9).

(6) 33 R. R. 259 (9 B. & C. 561).

(7) 46 R. R. 733 (2 M. & W. 658).

(8) 42 R. R. 408 (3 Ad. & El. 371).

(9) 5 R. R. 580 (2 Bos. & P. 238).

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as to whether the flour sent is that which has been sold. Upon every principle of construction, that imports the fact of a sale.

Cur. adv. vult.

ALDERSON, B., now said :

There was a case of *Archer v. Baynes*, tried before me at the last Liverpool Assizes, in which a motion was made to enter a verdict for the plaintiff for 35*l.* 4*s.* 4*d.*, the admitted amount of the damages. At the trial, the plaintiff was nonsuited on the ground that there was no sufficient note or memorandum in writing of any contract to take the case out of the Statute of Frauds; and that question, having been reserved, was argued before the three Judges who are now present in Court (1), and we are of opinion that the rule must be discharged. No doubt, if the letter of the plaintiff of the 3rd of October, and of the defendant in answer, taken together, contained a sufficient contract, namely, one that would express all its terms, they would constitute a memorandum in writing within the statute. We have no difficulty, therefore, in coming to the conclusion that these letters may be looked at for the purpose of seeing whether or not they contain a sufficient contract to take the case out of the statute; but looking at them, we do not think they do. They do not express all the terms of the contract; and the case is in truth governed by **Richards v. Porter*, which was cited in the course of the argument, and in which Lord TENTERDEN gave a similar decision as to a document of a similar nature which was then before him. There is a distinct refusal on the part of the defendant to accept the flour which he had bought of the plaintiff. It is clear from the letters that he had bought the flour from the plaintiff upon some contract or other; but whether he bought it on a contract to take the particular barrels of flour which he had seen at the warehouse, or whether he had bought them on a particular sample which had been delivered to him, on the condition that they should agree with that sample, does not appear; and that which is in truth the dispute between the parties is not settled by the contract in writing; and therefore the rule must be discharged.

Rule discharged.

(1) Alderson, B., Rolfe, B., and Platt, B.

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IN RE GORHAM *v.* THE BISHOP OF EXETER (1).

(5 Ex. 630—682; S. C. 19 L. J. Ex. 376; 14 Jur. 876.)

Under the 25 Hen. VIII. c. 19, an appeal lay from the Archbishop's Court to the Delegates in all spiritual causes, whether touching the King or not; and, therefore, by the 2 & 3 Will. IV. c. 92, there is now an appeal, in such cases, to the Judicial Committee of the Privy Council, whose decision is final.

Semble, that the 9th section of 24 Hen. VIII. c. 12 (2), which, in matters touching the King, gives an appeal from certain Ecclesiastical Courts to the Upper House of Convocation, is repealed by the 25 Hen. VIII. c. 19.

Quære, whether a proceeding by *duplex querela* is a "matter touching the King" within the 24 Hen. VIII. c. 12, s. 9.

SIR F. KELLY, in last Term, (June 6,) obtained a rule, calling on Sir Herbert Jenner Fust, Knight, Dean of the Arches, and Official Principal of the Arches Court of Canterbury, and the Archbishop of Canterbury, to show cause why a writ of prohibition should not issue, to prohibit them and each of them from admonishing, or requiring by monition, citation, or otherwise, Henry, Lord Bishop of Exeter, Ralph Barnes, Gent., the secretary of the said Bishop, and deputy registrar of the principal registry of the diocese of Exeter, or any other officer of the said Bishop, *or of his Episcopal or Consistorial Court, or from proceeding to enforce or give effect to any monition, citation, or other process requiring the said Bishop or officers aforesaid to transmit or cause to be transmitted to the registry of the said Arches Court or elsewhere, the letters of presentation of her Majesty, under the Great Seal, bearing date the 2nd of November, 1847, addressed to the said Lord Bishop of Exeter, and presenting the Rev. George Cornelius Gorham, clerk, for admission, institution, and induction, by or under the authority of the said Bishop, to the vicarage of Brampford Speke, in the county of Devon and in the diocese of Exeter; and also to prohibit the said Sir Herbert Jenner Fust and the said Archbishop of Canterbury, and each of them, from admitting, instituting, or inducting, or authorising the admission, institution, or induction of the said George Cornelius Gorham to the said vicarage, or otherwise observing, complying with, or in any way proceeding to give effect to or carrying into execution a certain Order of her said Majesty in Council, on or about the 9th of March, 1850, upon a certain report or recommendation of the Judicial Committee of the

1850.

April 25.

June 6, 29.

July 1, 2.

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(1) See also *Ex parte The Bishop of Exeter, In re Gorham v. The Bishop of Exeter* (1850) 10 C. B. 102, and *Gorham v. The Bishop of Exeter* (1850) 81 R. R.

504 (15 Q. B. 52), *Gorham v. The Bishop of Exeter*, 14 Jur. 443.—J. G. P.

(2) Part of s. 4 in the Statutes Revised. See *post*, p. 801.—J. G. P.

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Privy Council, in a certain cause or alleged cause of appeal from the judgment of the said Arches Court in a suit of *duplex querela* between the said George Cornelius Gorham, clerk, and the said Lord Bishop of Exeter, and which said report or recommendation was made to her said Majesty by the said Judicial Committee of the Privy Council on or about the 8th of March, 1850.

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The affidavits in support of the application stated the following facts : The vicarage of Brampford Speke, in Devonshire, is a benefice with cure of souls in the diocese of Exeter. The patronage and right of presentation belong to the Queen, who, in right of her Crown, is seised in fee of the advowson as one in gross. On the 3rd of March, 1847, the vicarage became void by death ; and on the 2nd of November, 1847, the benefice remaining so void, the *Queen, as patron, in right of the Crown, did, by letters patent of that date, present to the Bishop of Exeter the Reverend George Cornelius Gorham as her Majesty's clerk appointed to the said vicarage, commanding the Bishop to admit the said G. C. Gorham thereto, and to institute, induct, and invest him, and do all other matters concerning the admission, institution, and induction which to the Bishop's pastoral office belonged.

The Bishop, by his affidavit, stated, that he as such Bishop as aforesaid is the Ordinary, and hath full ecclesiastical and spiritual jurisdiction in and over the said vicarage and the vicar thereof for the time being ; and that, as such Bishop and Ordinary, he has full and sole right and authority by law to admit, institute, and induct, or to authorise the admission, institution and induction of, each and every person from time to time presented by her Majesty, as such patron as aforesaid, for admission &c. into the said vicarage as the vicar thereof ; and that, before such admission &c., he, as such Bishop and Ordinary, has also the full and sole right and authority by law, and it is moreover his bounden duty and obligation, to examine the person so presented, and to ascertain and determine, as the spiritual Judge, the fitness and qualifications of such person for such admission &c., with reference as well to his faith and doctrine as to his learning, morals, ability, and sufficiency, according to the laws ecclesiastical of this realm ; and in the event of his finding and determining, upon such examination, that the person so presented is unfit or disqualified, by reason of his insufficiency in any of the matters aforesaid, then to refuse to admit, institute, or induct such person. That, on the presentation by her Majesty of the said G. C. Gorham, and after receipt of the said letters

patent, the Bishop, as such Bishop and Ordinary, according to his said right and duty in that behalf, examined the said G. C. Gorham, in order to ascertain and determine whether he was fit and qualified, according to the laws ecclesiastical of this realm, to be admitted *&c., to the said vicarage; and that upon such examination deponent ascertained and determined, according to his conscientious judgment and belief, that the said G. C. Gorham did then hold, maintain, and affirm certain unsound doctrines and opinions, contrary to the true Christian faith, and contrary to and inconsistent with the doctrines of the Church of England, the Thirty-nine Articles of Religion, and the Book of Common Prayer, authorised and enjoined by the Act of Uniformity (13 & 14 Car. II. c. 4); and that, by reason and in consequence of the said G. C. Gorham so holding, maintaining, and affirming such doctrines and opinions, the deponent as such Bishop and Ordinary did then adjudge and determine that the said G. C. Gorham was, as the deponent still believes him to be, a person unfit and unqualified to be admitted &c. to the said vicarage; and that such holding, maintaining, and affirming such doctrines and opinions as aforesaid was a lawful and sufficient cause for the deponent's refusing to admit &c., the said G. C. Gorham to the said vicarage; and, by reason thereof, the deponent, as such Bishop, &c. thereupon refused to admit the said G. C. Gorham to the said vicarage, or to institute, induct, or invest him &c.

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The Bishop gave notice to her Majesty of his refusal; and in Trinity Term, 1848, the said G. C. Gorham commenced a suit of *duplex querela* against the Bishop in the Arches Court of Canterbury (1), such suit being in the nature of an appeal from the said judgment and determination of the Bishop as such Bishop and Ordinary. The suit was heard by the Dean of the Arches and Official Principal, Sir Herbert Jenner Fust; and on the 2nd of August, 1849, he gave judgment, that the said G. C. Gorham did hold and maintain such unsound doctrines and opinions as aforesaid, and that, by reason thereof, he was unfit and unqualified to be *admitted &c. to the said vicarage; and that the Bishop had shown sufficient reason for refusing to admit, &c.: and the defendant was dismissed with costs.

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The said G. C. Gorham appealed from that judgment to the Queen in Council, and petitioned her Majesty, "that the said judgment might be reversed and annulled; and that the said

might be, admitted, &c. to the said vicarage." Her Majesty referred the petition to the Judicial Committee, and they heard counsel on both sides on the petition, and on or about the 8th of March, 1850, reported to the Queen that the judgment of Sir HERBERT JENNER FUST ought to be reversed; and that it ought to be declared that the Bishop had not shown sufficient cause why the said G. C. Gorham should not be admitted, &c.; and that the principal cause ought to be remitted to the Court of Arches, in order that right might be there done.

The Queen, by Order in Council, 9th of March, 1850, approved of the report, and directed that it should be carried into execution. In pursuance of that order, the cause was remitted to the Arches Court; and the Official Principal, in order to carry the recommendation of the Judicial Committee of the Privy Council into effect, caused the registrar of the Episcopal Court to be served with a monition to return into the Arches Court the letters patent by which the said G. C. Gorham was presented to the Bishop for admission, &c. A copy of the monition was also served upon the Bishop, who now deposed that he was informed and believed, that the last-mentioned Order in Council was about to be enforced, and the admission to take place, unless a prohibition were granted.

The Bishop's affidavit also stated, that since the hearing of the said appeal by the said Judicial Committee, he had been advised by counsel that the said G. C. Gorham was not entitled to appeal from the said judgment of the Arches Court to the Queen in Council, nor had her Majesty power *or authority by law to refer the petition to the Judicial Committee, nor had the Judicial Committee power to hear or report thereon; and that her Majesty had not power, &c., to make the said Order in Council of the 9th March, 1850, nor the Official Principal to give it effect, nor the Archbishop of Canterbury to admit, &c.; but that the appeal and all the proceedings thereon were void, and the judgment of the Arches Court still in force. That he was not, before or at the time of the hearing of the said appeal before the Judicial Committee of the Privy Council, nor for some time afterwards, informed or aware that the said G. C. Gorham was not entitled or allowed by law to appeal to her Majesty in Council against the said judgment, or that the said matters and proceedings had, or likely to be had thereon, were or would be null and void in law; and that he had no opportunity, and was not able, at any time before or during the hearing of the

authority of her Majesty, or of the said Judicial Committee, in the matters aforesaid."

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In last Easter Term (April 25th), the Bishop of Exeter made a similar application for a prohibition to the Court of Queen's Bench (1); and that Court, after taking time for consideration, refused to grant a rule. Later in the same Term (May 2), application was made to the Court of Common Pleas (2); and that Court also, after consideration, refused to grant a rule.

The *Attorney-General*, *Greenwood*, and *Cowling*, showed cause (3):

The case involves two questions: First, whether the 9th section of the 24 Hen. VIII. c. 12, is incorporated with the 25 Hen. VIII. c. 19: Secondly, if it be, whether this is a cause, matter, or contention touching the Queen. The *Court cannot fail to see that the object of this application is to revive the authority of the Convocation, a proceeding which is thus denounced as a dangerous experiment by Burke, in his Letter to the Sheriffs of Bristol: "We know that the Convocation of the clergy had formerly been called, and sat with nearly as much regularity to business as Parliament itself. It is now called for form only. It sits for the purpose of making some polite ecclesiastical compliments to the King; and when that grace is said, retires, and is heard of no more. It is, however, a part of the Constitution, and may be called out into act and energy whenever there is occasion, and whenever those who conjure up that spirit, will choose to abide the consequences. It is wise to permit its legal existence; it is much wiser to continue it a legal existence only." In considering these questions, it is important to observe the discrepancy between the arrangement of the sections of the 24 Hen. VIII. c. 12, on the original record, and as usually printed. That statute, as engrossed on the original record, consists of four sections only: the first comprises the 1st, 2nd, and 3rd sections *of the statute as printed in the ordinary editions (4); the second is the same as the 4th; the third comprises the 5th, 6th, *and 7th; and the fourth includes the 8th, 9th, and 10th. The 1st section prohibits appeals to the see of Rome, in *three cases: viz. "in causes testamentary, causes of

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(1) 81 R. R. 504 (15 Q. B. 52).

C. B., Alderson, B., Rolfe, B., and Platt, B.

(2) 10 C. B. 102.

(3) The rule was argued June 29th, and July 1st and 2nd, before Pollock,

(4) And as printed in the Statutes Revised.—J. G. P.

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marriage and divorce, rights of appeals and objections. 110
 *2nd section enforces that enactment by the imposition of penalties. The 3rd section provides for the mode of appeals *within this realm, viz. from the Archdeacon, if the cause began there, to the Bishop diocesan; from the Bishop diocesan, *if commenced before him, then within fifteen days to the Archbishop, and there to be definitely adjudged; or if commenced before the Archdeacon of any Archbishop, to the Court of Arches, and from that Court to the Archbishop of the province, there to be definitively adjudged. The 4th section, in that part which corresponds with the 8th of the ordinary editions, enacts, that causes commenced before any Archbishop shall be by him "definitely determined." Then *the portion corresponding with the 9th section says, that in any cause depending "in any of the aforesaid Courts," that is, those Courts mentioned in the 3rd section, if the matter touches the King, the appeal shall be to the Upper House of Convocation. The argument on the other side in substance is, that the 24 Hen. VIII. c. 12, having taken away the right of appeal in three sorts of spiritual cases, and transferred it to certain tribunals within the realm, when the 25 Hen. VIII. c. 19, extended that enactment to all spiritual cases, it necessarily extended the provisions of the 4th section, by which, in the case of matters touching the King, the appeal is to go to the Upper House of Convocation. But the foundation of that argument fails, because there is no appeal where the suit is originally commenced in the Archbishop's Court. And it may be here observed, that the sentence of divorce of the King from Queen Katherine of Arragon, pronounced by Archbishop Cranmer, and which is found in the life of Henry VIII. by Lord Herbert of Cherbury, p. 347 (1), follows the language *of the first part of the 4th section of the 24 Hen. VIII. c. 12.

(1) The part of the sentence referred to is as follows: "Idcirco nos Thomas Archiepiscopus Primas et Legatus antedictus, Christi nomine primitus invocato, ac solum Deum præ oculis nostris habentes, pro nullitate et invaliditate dicti matrimonii pronunciamus, decernimus, et declaramus, ipsumque prætensum matrimonium fuisse et esse nullum et invalidum, ac divino jure prohibente contractum et consummatum, nulliusque valoris aut momenti esse, sed viribus et firmitate juris caruisse et carere; præfatisque

illustrissimo et potentissimo principi Henrico Octavo ac Serenissimæ Dominæ Catharinæ non licere in eodem prætenso matrimonio remanere etiam pronunciamus, decernimus et declaramus, ipsosque, illustrissimum et potentissimum principem Henricum Octavum et serenissimam dominam Catherinam, quatenus de facto et non de jure dictum prætensum matrimonium ad invicem contraxerunt et consummarunt, ab invicem separamus et divortiamus, atque sic separatos et divortiatos, necnon ab omni vinculo

to the Convocation? In *Havor v. Thorol* (1), RICHARDSON, Ch. J., draws a distinction between the words, "definitive" and "final." He observes, that, notwithstanding the 25 Hen. VIII. c. 19, renders the sentence of the Delegates "definitive," the King may grant a commission of review; but that it would have been otherwise if the statute had said that the sentence of the Delegates should be "final." Also in Gibson's Codex, tit. xlv. c. vi. p. 1038, it is said, "When the case of the Royal power to grant a review came under consideration, 4 Car. I., two things were observed by RICHARDSON in favour of the prerogative: first, that the words of this statute are no further appeals to be had, and that the commission of review seems not to be an appeal, but only a suspension of the former sentence; secondly, that whereas the words of the 24 Hen. VIII., in case of the Archbishops, are, that the cause shall be finally adjudged and finally determined; and in case of the Upper House of Convocation, that their decree shall be final, and never after come in question and debate; here, in case of the King, the expression is only definitive, (which, in the language of the common and canon law, doth not exclude further consideration); and that no further appeals shall be had, which exclude not a review in virtue of a new commission."

POLLOCK, C. B.: The passage in 4 Institute, 341, is to the same effect.)

But assuming that under the 9th section of the 24 Hen. VIII. c. 12, an appeal lay from the Archbishop's Court to the Upper House of Convocation in matters touching the Crown, that enactment is not incorporated with the 25 Hen. VIII. c. 19, but is virtually repealed by it. The preamble *of the latter statute shows that the Convocations of the clergy were usurping the prerogative of the Crown. Up *to the time of its passing, they had been in the habit of occasionally assembling without the King's writ, and of discussing *whatever matters the Archbishops thought fit to propose: Wake's "State of the Church," pp. 11, 14, 17, 485, 439; Gilbert's Exch. 52, 55. They sat for long periods. *On the 5th of November, 1529, the last Convocation of that period was convened, and continued

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matrimoniali respectu dicti prætensi matrimonii, liberos et immunes fuisse et esse pronunciamus, decernimus, et declaramus per hanc nostram senten-

tiam diffinitivam, sive hoc nostrum finale decretum, quam sive quod ferimus et promulgamus in his scriptis."

(1) Litt. Rep. 228.

Church," p. 397. The 24 Hen. VIII. c. 12, added to their importance by introducing the anomaly of an appeal to one of the Houses. The 1st section of the 25 Hen. VIII. c. 19, prohibits the Convocation from assembling, except by authority of the King's writ; so that if an appeal lay to that Court in matters touching the King, he would have it in his power to impede the course of justice by refusing the writ. Perhaps it will be said, that this argument would equally apply to the House of Lords, which, though a court of appeal, cannot *assemble without being summoned by the Crown; but Sir Matthew Hale has clearly proved that the House of Lords never had an inherent jurisdiction in judicial matters: Sugden on the "Law of Property as administered in H. Lords," c. 1, p. 2. It would be strange, however, if the Legislature, in creating a court of appeal, should give to the party appealed against the power of controlling a decision in his favour. Or can it be supposed, that when the Legislature was thus curtailing the authority of the Convocation, it meant, by the same enactment, to extend its jurisdiction as a court of appeal? If their appellate jurisdiction was intended to continue or be increased, would there not have been some provision requiring the Crown to summon them as a court of appeal: especially as the 4th section shows that the Legislature was awake to the necessity of such a provision? If there is any ambiguity in the language, the Court will construe it rather as superseding the appellate jurisdiction of the Convocation than extending it. The appeal clauses may be considered as distinct from the preceding sections, which are a mere transcript of "The Submission of the Clergy:" Concilia Mag. Brit. Vol. 3, pp. 753, 770. The 2nd section of the 25 Hen. VIII. empowers the King to appoint a commission, consisting partly of laymen, to review the canons. Section 3 is general in its terms, and declares that no manner of appeals "of what nature, condition, or quality soever they be of," shall be made out of the realm; but that all appeals, "of what nature or condition soever they be of, or what cause or matter soever they concern," shall be made "after such manner, form, and condition" as is limited for appeals in causes of matrimony, tithes, oblations and obventions, by the 24 Hen. VIII. c. 12. The words "manner, form, and condition," must be read in the same sense as the words "nature, condition, or quality." The language of that section is wide enough to include matters touching the Crown: *Rex v. *Wright* (1).

tion of the 3rd, gives an appeal from the Archbishop's Court to the Delegates "like as in case of appeal from the Admiral's Court, to hear and definitely determine such appeals, and the causes concerning the same." But there never was an appeal from the Admiralty Court in matters touching the King. The statute is a remedial one, and perhaps meant to give a concurrent jurisdiction to the Convocation and the Delegates, at the option of the parties grieved, or an ultimate appeal from the Delegates to the Convocation; indeed, that is the only way in which *Goodman's* case (1) can be explained. The 6th section is conclusive on this point: it provides that appeals from peculiars shall be made direct to the King in Chancery. Now, matters touching the King may arise as well in peculiars as in Diocesan Courts; and it would be absurd to say, that in the one case the appeal is to go to the King in Chancery, and in the other to the Convocation.

Some light may be thrown on the construction of these statutes, by considering the circumstances under which they passed. At the beginning of the twenty-fourth year of the reign of Henry VIII. the question as to the validity of the King's marriage with Queen Katherine of Arragon was still pending, and she was desirous of appealing to the Pope: Parker de Antiq. Eccl. Brit. 328, ed. 1605. On the other hand, the King was desirous of avoiding that, and therefore caused the 9th section to be inserted in the 24 Hen. VIII. c. 12, the effect of which would be to compel her to bring her appeal to the Upper House of Convocation. His reason for selecting that body was, that Archbishop Cranmer had already brought the question of the validity of that marriage before the Convocation, when there appeared a considerable difference of opinion in the Lower House, but in the Upper House a large majority *declared it void: Burnet's Hist. Ref. bk. 2, p. 129, ed. 1679. After that session of Parliament was over, Cranmer summoned Queen Katherine to appear before him in his Court at Dunstable, and, on her non-appearance, pronounced her marriage void: Life of Henry the Eighth, by Lord Herbert, 347, ed. 1649; Strype's Eccl. Mem. bk. 1, c. 9. Henry, however, found that the clergy could not be relied on, and therefore determined to enforce their "Submission," by passing it into a law, and at the same time to provide an appeal tribunal upon which he could depend. He accordingly caused the 25 Hen. VIII. c. 19, to be passed. But

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(1) 3 Dy. 272.

c. 12; but, in the same book, p. 232, tit. "Appeale (G) Delegates," it is stated, that, by the 25 Hen. VIII. c. 19, an appeal from the Archbishops' Courts is given to the King in Chancery, and no allusion is made to matters touching the Crown. In the British Museum there are seven volumes of a Digest of Statutes, one bearing the name of Rastall, and two of which were compiled previous to the 24 Hen. VIII., the rest subsequently. Under the title "Appeal," the 25 Hen. VIII. is referred to as giving an appeal to the King in *Chancery in all spiritual matters, but no mention whatever is made of an appeal to the Convocation in matters touching the King. In Hawkins' P. C., bk. 1, c. 19, s. 20, it is said, "The third offence of this nature, viz. that of appealing to Rome from any of the King's Courts, is made a *præmunire* by 24 Hen. VIII. c. 12, and cc. 20, 21, and 25 Hen. VIII. c. 19, by which it is enacted, 'that all such appeals as formerly were made to Rome, shall from henceforth be made to the High Court of Chancery.'" The same is stated in Bacon's Abridg. "Præmunire" (A).

The authorities also support the construction now contended for. In the year 1695, Dr. Watson, Bishop of St. David's, was sued in the Archbishop's Court for simony and other offences; and after sentence of deprivation against him, he appealed to the Delegates; and fearing that they were about to decide against him, he moved the Court of King's Bench for a prohibition, which, however, was refused by the whole Court: *Episcopus St. David v. Lucy* (1). Holt, Ch. J., in delivering judgment said, "The notion of the deprivation of Bishops by the Convocation is new, and started by Sir Bartholomew Shower, and (by him) the Convocation has not any such power: and if there was such power in the Convocation, it is presumable that care would have been taken in the Act of Hen. VIII., that there should have been an appeal from them." In the report of the same case in Salkeld (2), Holt, Ch. J., is stated to have said that the Convocation "was a new fancy of Sir Bartholomew Shower's." The Bishop then petitioned the House of Lords (3), on the ground that the sentence of deprivation having been passed by the Archbishop of Canterbury, who had not authority to do it, the Bishop had just reason to protect himself by his privilege as a Peer. The *Attorney-General*, in delivering his

(1) 1 Ld. Ray. 539.
(2) 1 Salk. 134.

(3) 14 How. St. Tr. 455.

opinion as to how far the King's supremacy was concerned in the question, *said, that, "by the 25 Hen. VIII., the final appeal in all ecclesiastical causes whatsoever is directed to be from the Archbishop to the King in Chancery. It is said, with reference to *Goodman's* case, that there the commission was not issued under the 25 Hen. VIII., but by virtue of the general visitatorial prerogative of the Crown in ecclesiastical matters; it would seem, however, from two letters of the 22nd of May, 1551, from Dean Turner to Secretary Cecil, still extant in the State Paper Office, that such was not the case; though it must be admitted that the account of that contest given in Strype's Memorials, leaves the matter in doubt. He says (1), "February 18, the Archbishop had a letter sent to him by the Council to proceed in the appeal between the Bishop and the Dean: for Goodman, after his deprivation, had made a formal appeal unto the King. But whether that appeal was to be allowed, since the King had left *Goodman's* case unto the decision of his Commissioners Delegate for that purpose, and they had judged and deprived him, was a case much argued by the Judges. And this was the opinion of most of them, viz. where a sentence is given by Commissioners Delegate by the Prince, the party grieved appealing, such appeal is out of the order prescribed by the said statute. And the Prince in that case may grant a new commission to others to determine that appeal. And this was done. The issue was, Goodman's deprivation stood, but the Bishop was constrained to sue for a pardon." This matter was also discussed in *Hutton's* case (2). There Sir Timothy Hutton presented a clerk to a living, but the Bishop refused him, and thereupon he complained to the Archbishop, who caused him to be instituted and inducted. The Bishop, and another clerk, who was presented by the Crown, sued in the Delegates, and a prohibition was granted. "The opinion of the Court was, that, if a suit be before an Archdeacon, whereof, by the statute of 23 Hen. VIII. c. 9, the Ordinary may license the suit to a higher Court, that the Archdeacon *cannot, in such case, baulk his Ordinary, and send the case immediately into the Arches; for he hath no power to give a Court, but to remit his own Court, and to leave it to the next; for, since his power was derived from the Bishop, to whom he is subordinate, he must yield it to him of whom he received it; and it was said that so it had been ruled heretofore." To these authorities may be

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(1) Vol. ii., Bk. 1, c. 28, p. 371, (2) Hob. 15.
ed. 1816.

Rex v. Weedon, referred to by the Court of Common Pleas on refusing a rule in this case, and which are to be found in the Catalogue, by Dr. Addams, of the Processes in the Registry of the High Court of Delegates, from 1609 to 1822. The distinction is thus pointed out in Roll. Abr. tit. "Prerogative le Roy (G), Delegates," pl. 2: "But it is to be observed, that this appeal to the King in Chancery is solely by the statute aforesaid (25 Hen. VIII. c. 19), upon a suit in the Court of the Archbishop, or in a peculiar exempt; for if there be a suit on a general commission of the King, there no appeal can be made to the King in Chancery within the statute 25 Hen. VIII. c. 19, by the words aforesaid. And therefore there may be an appeal to the King generally, as he is supreme head of all ecclesiastical jurisdiction within the realm, and this ought to be on a bill signed by him, before the Chancellor can make out the Commission of Delegates to hear it. But on appeals on the statute 25 Hen. VIII., the Chancellor can grant the commission of himself, of course, without any bill signed. 5 Edw. VI.: Stephen Gardener was deprived on a commission delegate, and he appealed to the King generally, and not to him in Chancery; and on this sentence was repealed 1 Mar., as I have by report of Mr. Selden; and so it was done in *The Lord Hartford's* case, 1 Jac." The authorities cited in moving for this rule, as explained by the LORD CHIEF JUSTICE of the Common Pleas, in delivering the judgment of the COURT in *Gorham v. Bishop of Exeter* (1), are *all referable to the passage in 4 Inst. 341; but it is evident that Lord Coke was not of opinion, that, in all cases touching the King, the appeal must be to the Convocation; for in treating of the Prerogative Court of the Archbishop of Canterbury (2), after mentioning what is to be done when the King is made executor, he says, that from that Court the appeal is to the King in Chancery. The case of *Dyke v. Walford* (3), which is referred to by Lord CAMPBELL, Ch. J., in delivering the judgment of the Court in *Gorham v. Bishop of Exeter* (4), is also an authority in point (5).

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- (1) 10 C. B. 102.
- (2) 4 Inst. 334.
- (3) 70 R. R. 75 (5 Moo. P. C. 434).
- (4) 81 R. R. 504 (15 Q. B. 52).
- (5) In 15 Jur. 889, *Martin* is reported to have said, that the appeal in *Dyke v. Walford* was brought by consent. The reporters, however,

learn from the *Attorney-General* for the Duchy of Lancaster, that it had been agreed between the *Attorney-General* for the Crown (*Sir F. Pollock*) and himself, that on the first occasion of the question between the Crown and Duchy arising, the appeal should be taken up to the tribunal of the last resort, and that it had been taken for

(POLLOCK, C. B. : *Whiston's case* (1) shows that no meeting of the Convocation, as a judicial Court, took place after the passing of the 25 Hen. VIII. c. 19, up to the year 1711. By that case, the Archbishop and Bishops of the province of Canterbury, in Convocation assembled, petitioned the Crown, stating that Whiston had asserted certain heretical doctrines, and that the Convocation was desirous of calling him before them, in order either to his amendment, or expulsion from the Church of England ; but being doubtful whether they had jurisdiction since the 25 Hen. VIII. c. 19, they prayed the Queen to lay the matter before the Judges, to whom, with the *Attorney-General* and *Solicitor-General*, it was accordingly referred ; and eight of the twelve, with the *Attorney-General* and *Solicitor-General*, concurred in opinion that the Convocation had a jurisdiction in cases of *heresy, and four of the Judges came to a different conclusion.

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(ALDERSON, B. : That case is also mentioned in Burnet's " History of his own Time," vol. ii. p. 57, and in Lathbury's " History of the Convocation," p. 338.)

In the reign of William III., the King assembled the Convocation, and endeavoured, by their means, to heal the dissensions of the Church : Somers' Tracts, vol. ix. p. 587. This gave rise to much discussion, and there is a letter of Sir B. Shower's on the subject still extant : Somers' Tracts, vol. ix. p. 411 ; but there is no suggestion in it of any appellate jurisdiction, though evidently written by a keen partisan.

(They then argued, that a case of *duplex querela* before the Archbishop was not a " cause, matter, or contention, touching the King," within the meaning of the 9th section of the 24 Hen. VIII. c. 12, which had reference to the three classes of causes mentioned in the earlier part of the statute, viz. " causes testamentary," " causes of matrimony and divorces," and " rights of tithes, oblations and obventions." They cited Oughton's *Ordo Judic.* tit. 159, p. 239 ; 2 Inst. 631, 632 ; *Rex v. The Bishop of Hereford* (2), *Elvis v. The Archbishop of York* (3).)

A further question arises, whether this Court has a jurisdiction granted, on both sides, that this would be the Judicial Committee. When the case occurred, *Sir John Jervis* was *Attorney-General* ; and the appeal went, as a matter of course, to the Judicial Committee without any discussion as to the jurisdiction, which was taken for granted.

(1) 15 How. St. Tr. 705.

(2) Comyns, 358.

(3) Hob. 320.

an opinion that they had such jurisdiction, but it became unnecessary to decide the point. The writ of prohibition is a prerogative writ, issuing properly out of the Queen's Bench. It is indeed stated in Comyns' Dig. "Prohibition," (B.), and Blackstone's Com. vol. 3, p. 112, that the Court of Exchequer may grant a prohibition; but the authority referred to for that position is the case of *Ilen v. Seymore* (2), and there the party obtaining the prohibition was a farmer or accountant to the Crown. In Tidd's Practice, vol. 1, p. 38, it is said that the Court of Common Pleas, as well as the Queen's Bench, has jurisdiction in prohibition, but the Court of Exchequer is not mentioned as having it.

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Sir F. Kelly, Martin, Peacock, and Badeley, in support of the rule:

It is not necessary either to admit or disclaim a wish to revive the Convocation, for this is a pure question of law, to be determined solely on legal principles. The distinction, however, should be borne in mind, between the Convocation as a legislative and as a judicial body; and also between the meetings of the Convocation generally, and those of the Upper House only, which is now composed of the Archbishops and Bishops of the realm. Formerly, the sole taxation of the clergy belonged to the Convocation, so that there was as much reason for their assembling as for Parliament meeting. No general assembly of the Convocation can take place without the Queen's writ; and although the Convocation has now fallen into disuse, yet the Upper House meet annually, as a matter of form, and then adjourn. The practice by which the superior Courts are governed in applications of this nature, is thus stated by Lord MANSFIELD, Ch. J., in the case of *St. John's College v. Todington* (3): "If the party who applies for a prohibition has a right to declare, though the Court should see no ground for the motion, a rule to show cause why the prohibition should not be granted, is to no purpose; and hearing counsel upon the sufficiency of that cause is time mis-spent. When the matter seems doubtful to the Court upon a question of fact or law, the plaintiff has leave to declare, that the parties may have the fact properly tried by a jury, or the law solemnly considered as in a cause. When the Court is clearly of opinion that there is sufficient ground for the

(1) 2 Cr. M. & R. 748.
(2) Palmer, 525.

(3) 1 Burr. 198.

prohibition, the defendant has a right to put the plaintiff to declare, that his jurisdiction be not taken from him in a summary way, where no writ of error will lie. But if the Court be clearly of opinion that there is no ground for a prohibition, it ought to be denied, without putting the defendant to expense, and delaying, in the meantime, the exercise of what appears to them a lawful jurisdiction. This denial is not conclusive on the plaintiff. *If there is no jurisdiction, the sentence will be a nullity, and upon any attempt to execute or enforce it, the whole may be tried in an action." It has been suggested, that this Court has no jurisdiction in prohibition, but there are several instances in which it has been exercised: *Roberts v. Humby* (1), *Grimbley v. Aykroyd* (2), *In re Bartlett* (3).

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(POLLOCK, C. B.: There is no doubt about our jurisdiction to grant a writ of prohibition.)

Then as to the question whether the 9th section of the 24 Hen. VIII. c. 12, is incorporated with the 25 Hen. VIII. c. 19, or virtually repealed by it. It is first necessary to consider the language of the statutes independently of authority. One well-known rule is, that statutes are to be construed according to their ordinary grammatical sense, unless such a construction would lead to some absurdity or inconvenience: *Becke v. Smith* (4), Vin. Abr. Statutes (E 6). Another rule is, that the King shall not be restrained of his liberties or rights by general words in an Act of Parliament: *Dwarris on Statutes*, Vol. 2, p. 668; *Attorney-General v. Donaldson* (5); Vin. Abr., Statutes (E 10). The collocation of the provisions of these statutes cannot affect their construction, for statutes are to be read as if written in one continuous paragraph. No difference of opinion exists as to the 5th, 6th, and 7th sections of the 24 Hen. VIII. c. 12. The 8th is also free from doubt. Those sections relate to the three classes of cases where subjects alone are interested; the 9th section provides for the same causes touching the King, and then the appeal is to be from any of the Courts aforesaid to the Upper House of Convocation. Such being the state of the law, the 25 Hen. VIII. c. 19, passed; the 3rd section of which enacts, "That all manner of appeals, of what nature or condition soever they be of, or what cause or matter soever they concern, shall be made and had by the parties aggrieved, &c. after such manner, form, and condition" *as is limited for appeals in causes of

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(1) 49 R. R. 535 (3 M. & W. 120).

(4) 46 R. R. 567 (2 M. & W. 195).

(2) 1 Ex. 479.

(5) 62 R. R. 540 (10 M. & W. 117).

(3) 77 R. R. 543 (3 Ex. 28).

c. 12. The Legislature in effect says, whereas, in those three classes of cases, where the subject is concerned, there is an appeal from the Archdeacon to the Bishop, and from the Bishop to the Archbishop; but in matters touching the King the appeal is to the Upper House of Convocation; henceforth the same modes of appeal shall be extended to all cases. The words "manner, form, and condition," might refer only to the form of procedure; but it is conceded on all hands, that they cannot have that signification here; and their meaning is, "from the same Court to the same Court, and with the same limit as to time as now prevails in causes matrimonial, tithes, and oblations, under the 24 Hen. VIII." The Court of Common Pleas considered, that, as the 8th and 9th sections of that Act were preceded by express and distinct words of enactment, the "manner and form" mentioned in the 25 Hen. VIII. would not have reference to the appeal given in suits which touched the King; but the words "manner and form" govern the 8th and 9th, as well as the 5th, 6th, and 7th clauses. If a statute had passed declaring that all tithe causes should be tried in the Court of Queen's Bench, provided that any such as concerned the Queen should be tried in the Court of Exchequer, and then followed a clause that all causes testamentary should be tried in "manner, form, and condition aforesaid," the only construction which could be put on such an enactment is, that causes testamentary which concerned the Queen should be tried in the Court of Exchequer, and those which concerned the subject in the Court of Queen's Bench. The 3rd section of the 25 Hen. VIII. c. 19, does not repeal the 9th section of the 24 Hen. VIII. c. 12: Bac. Abr. "Ecclesiastical Courts" (B), Woodd. Lect. vol. i. p. 176; but extends to all spiritual causes the provisions which were previously confined to certain specified causes. Then, if the 9th section of the 24 Hen. VIII. c. 12, is not repealed by the 3rd section of the 25 Hen. VIII. c. 19, neither is it repealed *by the 4th section; for by the 9th section of the 24 Hen. VIII. an appeal is given to the Upper House of Convocation from any of the Courts aforesaid; whereas the 4th section of the 25 Hen. VIII. gives an appeal to the Delegates from the Archbishop's Court only; and, consequently, if it be construed as repealing the previous enactment, it provides no remedy by appeal from the other Courts in matters touching the King. It is clear, that, in all cases within the 4th section of the 25 Hen. VIII., there can be no appeal from the Delegates to the

Convocation. The 24 Hen. VIII. gives an appeal, in certain cases, to the Upper House of Convocation. The 25 Hen. VIII. extends that provision to all cases. How can that be construed as giving an appeal from the Delegates to the Convocation? In the comment on this statute in Burn's Eccl. Law, vol. i. p. 62, it is said, "In the case of *Saul v. Wilson*, M. 1689, by the Lords Commissioners: There lies no appeal from a sentence in a Court of Delegates; for they cannot have any original jurisdiction, because it is a matter grounded upon an Act of Parliament, and the Act gives them none."

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(POLLOCK, C. B.: Lord Coke's reading on the statute is this (1): "Where the matter toucheth the King, the appeal within fifteen days to be made to the higher Convocation House of that province, and no further, but finally to be there determined. . . . Item, a general clause, that all manner of appeals, what matter soever they concern, shall be made in such manner, form, and condition, within the realm, as it is above ordered by 24 Hen. VIII., in the three causes aforesaid; and one further degree in appeals for all manner of causes is given, viz. from the Archbishop's Court to the King in his Chancery, where a commission shall be awarded for the determination of the said appeal, and from thence no further."

It is argued that, possibly, the Legislature may have intended to give concurrent appeals; but such a construction *would be at variance with the language of the 9th section of the 24 Hen. VIII., which declares that the judgment of the Convocation shall be final; and, in addition, it might give rise to conflicting decisions on the same subject-matter. Suppose, for instance, the next of kin contest a will propounded by the executor, the King having an interest in the codicil, and the Prerogative Court pronounce in favour of both will and codicil; then the next of kin appeal to the Delegates, who reverse the decree both as to the will and codicil, while the executor, dissatisfied so far as relates to the codicil, appeals to the Convocation, which confirms both.

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The Court intimated an opinion that it was unnecessary to argue that point.

The 6th section of the 25 Hen. VIII. c. 19, which relates to exempt jurisdictions, may be thus explained. They were entirely omitted in the 24 Hen. VIII. c. 12, and the 25 Hen. VIII. c. 19, passed in a

"On the 27th of March it was sent up to the Lords; and since the spiritual Lords had already consented to it, there was no reason to apprehend any opposition from the temporal Lords. The session was now near an end, so that they made haste and read it twice that day, and the third time the next day, and passed it." Or probably the 6th section may have been inserted, in consequence of the peculiars being tenacious of their exemption from episcopal jurisdiction. The 24 Hen. VIII. c. 12, and 25 Hen. VIII. c. 19, having been repealed in the reign of Queen Mary, are both revived in terms by the 1 Eliz. c. 1, s. 10.

(ROLFE, B. : That must be taken with this restriction, that the law, as settled by those two Acts, and so far as they are not inconsistent with each other, shall be the law again.)

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In Cardwell's Synodalia, p. 76, some of the Judges, in 1711, in answer to a question put by the Queen say, "After conference with the rest of the Judges, we are humbly of opinion, that, of common *right, there lies an appeal from all Ecclesiastical Courts of England to your Majesty, in virtue of your supremacy in ecclesiastical affairs, whether the same be given by the express words of any Act of Parliament or not; and that no Act of Parliament has taken the same away, and, consequently, that a prosecution of Convocation, not excluding an appeal to your Majesty, is not inconsistent with the statute 1 Eliz. c. 1, but reserves the supremacy entire." It is upon this principle that the Crown has power to issue a commission of review, notwithstanding the 25 Hen. VIII. c. 19, has declared that the decision of the Delegates shall be final. The objection, that if an appeal lay to the Convocation in matters touching the Crown, it might obstruct the course of justice by refusing the writ, would equally apply to the House of Lords, whose appellate jurisdiction has been exercised from the most ancient times of which there are any memorials of record: Hale's Jurisd. H. L. 132.

The 25 Hen. VIII. c. 19, passed early in the year 1534; at which time Archbishop Cranmer had pronounced the marriage of Queen Katherine void. Under the 24 Hen. VIII. c. 12, the only mode of appeal to which the Queen could have recourse was to the Upper House of Convocation. But when the 25 Hen. VIII. c. 19, passed, the fifteen days limited for appealing, by the 9th section of the 24 Hen. VIII. c. 12, had expired, so that the sentence became final.

scribing a limited time within which to appeal to the Convocation, and give an appeal to the Delegates without any limit whatever?

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(ALDERSON, B.: We do not construe Acts of Parliament by reference to history. In deciding *Ryder v. Mills* (1) on the Factory Act, we did not act upon what we knew had taken place in Parliament. Besides, by the 25 Hen. VIII. c. 22, which became law on the same day as the 25 Hen. VIII. c. 19, the King's divorce from Queen Katherine was confirmed *by Parliament.)

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It is incorrect to say that there are no precedents of an appeal to the Convocation. The question of the marriage of Henry VIII. with Anne of Cleves was brought before them: 1 Strype, Eccl. Mem. 573. *Latimer's* case, which is another instance, is thus related in Collier's "Ecclesiastical History of Great Britain," p. 75. "About this time, *Hugh Latimer's* case was brought before the Upper House of Convocation. This Latimer had been dilated in the Synod last year (1532), for maintaining erroneous doctrines, in some letters written to one Greenwood, of Cambridge; and being required to take an oath to make a true answer to interrogatories, he declined the jurisdiction of the House, and appealed to the King; but the King refusing the application, returned him to the Convocation, upon which he acknowledged himself mistaken, and was pardoned on his submission."

With respect to the Irish statutes, 28 Hen. VIII. c. 6, and 28 Geo. III. c. 32, no question of appeal has arisen upon them, and they contain no provisions expressly relating to matters in which the King is concerned. Besides, the Irish hierarchy and ecclesiastical law differ in many particulars from the English, as pointed out in Gilbert's Exch., ch. 4 (2). The passage cited from Nathaniel Bacon's work is of little authority, it being the mere opinion of a layman on the construction of an Act of Parliament; and Lord Chatham, who was not a lawyer, viewed it merely as a political work. It was always considered a strong party work; and, in Clarke's "Bibliotheca," it is stated that the author was prosecuted. Bishop Nicolson, in his "English Historical Library," p. 184, says, "The great respect which has of late been paid to Nathaniel Bacon's 'Historical Discourse of the Uniformity of the Government of England' will oblige us to consider that author apart from the rest. There are several witty political and moral reflections in his book,

(1) 3 Ex. 553.

(2) Bk. 2, p. 142.

conclusions from weak and airy premises. His remarks on the clergy, upon all occasions, are so full of bitterness and invective as might have become Mr. Selden himself, and are an evident argument of the author's having a mind to ape even the very passions of that angry great man. . . . His main delight was, to blacken all our Kings, and to show that they had nothing lovely in them but what was derived from the favour and caresses of the people." The partisan character of the work also appears from the following passage, p. 133: "The Convocation of the clergy, like some froward children, loves not new dressing, though it be a gainer thereby. Before the Pope and Henry VIII. were fallen asunder, their masters, their minds, their work, all was double; their counsels uncertain; their conclusions slow in production, and slight in their fruit and consequences; sometimes displeasing to the Pope, sometimes to the King, generally to themselves; who, naturally lingering after their own interests, were compelled to feed the body that breathed in them, rather than that wherein themselves breathed; and so, like hunted squirrels from bough to bough, were ever well tired, yet hardly escaped with their own skins in the conclusion." It is said that nothing is found in the books of practice respecting an appeal to the Convocation; but that is merely a negative sort of evidence. The books of practice of half a century ago will probably afford little information on the subject of wager of battle, though it was not abolished until after the case of *Ashford v. Thornton* (1). Until the year 1677, there is no trace of any record of an appeal under the 25 Hen. VIII. c. 19, in a case in which the King was concerned; nor again from 1667 until 1796; nor from that time until the case of *Dyke v. Walford* (2). The case of *The Bishop of St. David's v. Lucy* (3) *has no application here, for the Bishop did not appeal under these statutes, but claimed his privilege as a Peer of Parliament. In *Whiston's* case (4), the only question was, whether the Convocation had an original jurisdiction in cases of heresy; and it appears from the statement of Burnet (5), that eight of the Judges, with the *Attorney-General* and *Solicitor-General* were of opinion that they had such jurisdiction. In *Hutton's* case (6), the King's right was not in question; for he was not the patron of the living, and the parties were properly left to their legal remedy. *Goodman's* case (7) was

(1) 19 R. R. 349 (1 B. & Ald. 405).

(5) 15 How. St. Tr. 714.

(2) 70 R. R. 75 (5 Moo. P. C. 434).

(6) Hob. 15.

(3) 1 Ld. Ray. 539.

(7) 3 Dy. 273, nom. *Walrond v.*

(4) 15 How. St. Tr. 705.

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not a proceeding under the statutes of Hen. VIII., but under the prerogative of the Crown as supreme head of the Church. In the case of *The Dean and Chapter of Fearnham* (1), it is said, "The visitation of all donatives of the King belongs properly to the Lord Chancellor of the realm: N. Br. 42 a; or the King may make special Commissioners for this purpose: 6 Hen. IV. c. 14, and *Goodman's* case, 10 Eliz. Dier, 273; where the Bishop of Bath and Wells had a special commission awarded to him by the King (Edw. VI.) to visit the Dean and Chapter of Wells; by force of which authority Goodman was deprived." Also in Com. Dig. "Visitor" (A 1), it is said, that "all free chapels of the King's foundation are visitable by the King and not by the Ordinary: 2 Roll. So all hospitals of the King's foundation: 2 Roll. 230, I. 17; and all donatives: 2 Roll. 230, I. 20." In *Gardener's* case, also, the commission issued by virtue of the general power of visitation which the Crown possessed, under the 26 Hen. VIII. c. 1, as supreme head of the Church. But, in any view, that was an illegal and tyrannical proceeding. Lord Campbell, in his "Lives of the Chancellors," vol. ii. p. 52, 53, says of that case, "The method of proceeding against him was violent, and was hardly disguised by any colour of law or justice. . . . A *commission was issued to the Metropolitan, three Bishops, and six laymen, to bring him judicially to trial. Having protested against the validity of the commission, which was not founded on any statute or precedent, he defended himself with vigour." In 4 Inst. 71, Lord Coke says, "the King himself cannot be Judge *in propria causa*;" and in *Day v. Savage* (2), HOBART, Ch. J., says, "that even an Act of Parliament made against natural equity, as to make a man Judge in his own case, is void in itself, for *jura naturæ sunt immutabilia*, and they are *leges legum*." These principles would be violated if an appeal lay to the Delegates in matters touching the Crown, under the 25 Hen. VIII. c. 19, and *à fortiori* to the Judicial Committee of the Privy Council, under the 2 & 3 Will. IV. c. 92, and 3 & 4 Will. IV. c. 41, whose decision does not bind the Crown.

(They then argued, that a proceeding by *duplex querela* was "a cause, matter, or contention touching the King" within the meaning of the 24 Hen. VIII. c. 12, s. 9. The following authorities were cited: *Specot's* case (3), 1 Stark. Ev. pt. 2, sect. 77; *Articuli Cleri*, 9 Edw. I., c. 13; 2 Inst. 632; *Bunting v. Lepingwell* (4); *Kenn's*

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(1) Dav. 46.

(2) Hob. 87.

(3) 5 Co. Rep. 57.

(4) 4 Co. Rep. 29.

case (7); Phillips v. Gatty (8); *Overton v. Hay* (9); *Willison v. Lord Barkley* (7); *Lord Sheffield's case* (8); *Hammond's case* (9); *Lamb v. Genman* (10); *Slade's case* (11); *Lord Cromwell's case* (12); *The Deanery of St. *Buryan*, 1 Rolls of Parliament, 421, 462; Oliver's Monasticon Diocesis Exoniensis; Bracton lib. 5, f. 403, B; *The Bishop of Exeter v. Hele* (13); Taylor's Evid. s. 1209; Phillipps' Ev. 543, 550; Hargrave's Law Tracts, 452, 457, 458, 464.)

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B. :

This was a rule *nisi*, granted at the instance of the Lord Bishop of Exeter, to prohibit the Right Honourable Sir Herbert Jenner Fust, &c. (his Lordship read the rule). The facts necessary to be stated for a due understanding of this case are as follows: In the year 1847 Mr. Gorham was presented by her Majesty to the living of Brampford Speke, in the diocese of Exeter. The Bishop refused to admit Mr. Gorham on the ground that he entertained opinions not in accordance with the doctrines of the Church of England. Upon this refusal, Mr. Gorham instituted a proceeding by *duplex querela* against the Bishop in the Court of the Archbishop of Canterbury, complaining of the decision of the Bishop, and alleging that he entertained no doctrines inconsistent with those of the Church. The case was heard before Sir HERBERT JENNER FUST, Dean of the Arches, who dismissed the complaint and confirmed the decision of the Bishop. Mr. Gorham then appealed from the judgment of Sir HERBERT JENNER FUST to her Majesty in Council; and the case was by her Majesty referred to the Judicial Committee of the Privy Council, by whom it was heard at great length in the month of February last; and in the month of March, the Judicial Committee reported in favour of the appeal, and made a recommendation to her Majesty accordingly; upon which her Majesty

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| (1) 7 Co. Rep. 42 b. | (8) 2 Roll. 317. |
| (2) Freem. 83—Q. B. | (9) Hard. 176. |
| (3) 43 R. R. 90 (1 Moo. P. C. 353). | (10) Parker, 143. |
| (4) 71 R. R. 581 (15 M. & W. 97). | (11) 4 Co. Rep. 95 b. |
| (5) Skinn. 447, 512; 2 T. R. 346. | (12) 4 Co. Rep. 13 a. |
| (6) Godb. 291. | (13) Show. P. C. 88. |
| (7) Plowd. 239; Godb. 308. | |

on the 9th of March, issued an Order in Council to carry into effect the report and recommendation of the Judicial Committee.

The appeal to her Majesty in Council was grounded on the statute 2 & 3 Will. IV. c. 92, which abolished the Court of Delegates created by 25 Hen. VIII. c. 19, s. 4, and enacted that all appeals which might have been made to that Court should thenceforth be made to the King in Council; and by the subsequent Act of 3 & 4 Will. IV. c. 41, s. 3, all such appeals are to be heard by the Judicial Committee.

At the beginning of last Easter Term, the Bishop of Exeter applied to the Court of Queen's Bench for a prohibition to prevent any further proceedings on the Order in Council, made pursuant to the judgment of the Judicial Committee, on the ground that the matter in controversy was one which touched the Queen as patron of the living, and that, in a case touching the Queen, there never was an appeal to the Delegates, and so neither would there now be an appeal to her Majesty in Council. The Court of Queen's Bench, after taking some time to consider, unanimously refused to grant a rule. The Bishop then, later in the same Term, made a similar application to the Court of Common Pleas, and that Court, in the following Term, by an unanimous decision, also refused to grant the rule applied for. The judgments of both those Courts proceeded on the ground, that even supposing the matter to be one which touched the Queen, still there was an appeal to her Majesty in Council under the statute 25 Hen. VIII. c. 19, altered by the subsequent statutes of the 2 & 3 Will. IV. c. 92; the order, therefore, which had been made was legal and valid; and so the Bishop was not entitled to a prohibition.

Late in the last Term, the Bishop renewed his application for a prohibition by applying to this Court; and under the circumstances of the case, the motion before us being made at a time when it was impossible for us satisfactorily to look into the authorities during the Term, we thought it best to grant a rule *nisi*, in order that the matter might be discussed and disposed of at the present sittings, instead of being left to stand over till Michaelmas Term, as it possibly *might have done if we had taken time till after the last Term to consider whether we ought or ought not to grant a rule *nisi*. The rule having been thus granted, cause was shown against it on the 29th.

The question now is, whether the rule is to be made absolute or to be discharged. This involves two points: first, whether this is

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it is admitted the appeal to the Queen in Council is well founded : secondly, whether in all cases, (touching or not touching the Crown), there is an appeal from the Archbishop's Court to the Queen in Council ; if there be, then also the appeal to her Majesty in Council is authorised by law, and this rule cannot be made absolute. In the Courts of Queen's Bench and Common Pleas the judgment was founded entirely on the second point ; we directed the attention of counsel to the first point also, entertaining as we then did, and still do, considerable doubt whether the matter touches the Crown or not. But we have thought it unnecessary to decide this point, as we are all clearly of opinion, that, whether a case of *duplex querela* before the Archbishop be one which touches the Crown or not, there was an appeal given by the 25 Hen. VIII. c. 19, to the King in Chancery, and therefore now there is an appeal to the Queen in Council. We have arrived at this conclusion by considering what is the combined effect of the two statutes, 24 Hen. VIII. c. 12, and 25 Hen. VIII. c. 19, by which last statute the authority of the Court of Delegates in these matters was first created ; for the Judicial Committee, without any doubt, have been substituted for the Court of Delegates, and have (at the least) the same jurisdiction.

We will therefore begin with the 24 Hen. VIII. c. 12. By that Act, restraining appeals to Rome in suits testamentary, matrimonial, and for tithes, there is, first, a general prohibition to all persons, subjects of this realm or resiants, to appeal to Rome under penalty of a *premunire* ; and then a provision by the 5th section, that where the King's subjects *or resiants within the King's dominions had before used to appeal to Rome, concerning the three causes before mentioned, they (*i.e.*, the King's subjects or resiants) should appeal within the realm of England, and not elsewhere, in the manner and form thereafter pointed out, and not otherwise.

The Act then proceeds to describe four classes of cases :

First, causes coming before the Bishops' Archdeacons, which are to be pursued through the Bishop's Court, and so to the Archbishop's Court, there to be definitively and finally ordered, decreed, and adjudged, without any appellation or provocation to any other person or persons, Court or Courts. Secondly, causes commenced before the Bishops which go to the Archbishop's Court, in precisely the same terms as to finality. Thirdly, suits commenced before the Archdeacon of the Archbishop,

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which, after going first through the Court of Arches, are to go before the Archbishop himself, (obviously referring to the Court, now obsolete and absorbed in the Court of Arches, formerly held before the Archbishop in person, assisted as he generally was by assessors). But this class of cases also, when arrived at this point, was to be definitively and finally determined, without any other or further process or appeal to be thereupon had or sued. The fourth class of cases was those of suits commencing (as this present case did) before the Archbishop himself—which were to be definitively determined by him, without any other appeal, provocation, or any other foreign process out of this realm, to be used to the let or derogation of the said judgment, sentence, or decree, otherwise than by this Act was limited and appointed.

This then was the state of the law: by express words, the decision of all these appeals by subjects or resiants grieved might be commenced in various Courts; but in all of them the decision of the Court of the Archbishop was to be final, otherwise than was by that Act limited and appointed. And the words were general, and clearly extended (if the Act had, *but for the proviso, stopped here) to all suits, whether such as touched the King or such as did not. But then came the 9th section as a sort of proviso or qualification of them all. That clause enacted, that in suits touching the King, ventilate, commenced, or begun in any of the said Courts (*i.e.* Bishops' or Archbishops' Archdeacons, or Bishops' or Archbishops' Courts), the final appeal should be to the "spiritual prelates, abbots, and priors of the Upper House of Convocation of the respective provinces where the suit began; and that what matter there should be determined, appertaining, concerning, or belonging to the King, his heirs or successors, should stand and be taken for a final decree, and the same matter never after to come in question and debate, to be examined in any other Court." The true meaning of this is clearly, we think, to repeal the finality as to decisions in the Archbishops' Courts in cases which touched the King, leaving it in all other cases. Then came the 25 Hen. VIII. c. 19, by which that which had been before confined to three classes of ecclesiastical cases, was extended to all. This was done, we think, by the conjoint operation of the two sections, the 3rd and 4th; which, it may be well to observe, form in the old black-letter editions of the statute only one paragraph. It would clearly be incorrect to say that the words of the 3rd section,

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to the obvious intention of the Legislature, for this would be to make the Legislature enact, first, that all these cases should be finally determined without any appeal from the Archbishop's Court; and then, by the 4th section, alter that provision by giving a further appeal to the Court of Delegates. It is, we think, clearly more simple and more reasonable to say, that the two sections, taken together, mean that the provisions as to the form and manner of appeals, given in the 24 Hen. VIII. c. 12, and amended by the 4th section of the 25 Hen. VIII. c. 19, shall extend to the three classes in the 24 Hen. VIII. c. 12, and all other ecclesiastical appeals whatsoever. And

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*if we do this, the natural mode of placing the sections in order, will be to superadd to the appeal to the Archbishop's Court a new court of appeal, thereby repealing the finality of that Court, and substituting in its place the finality of the new Court, (viz. the Court of Delegates,) and the declaration that there shall be no further appeal from them. Now, had the 24 Hen. VIII. c. 12, been so framed, it is clear that the Court of Delegates would have been the ultimate court of appeal provided by the 6th, 7th, and 8th sections of that Act. The words of the three sections were general, and applicable both to causes touching and not touching the King; the words of the section as to the Court of Delegates are general also. The Archbishop's Court was by these sections made final; the Court of Delegates is in like manner made final. The proviso in the 9th section altered the finality as to the Archbishop's Courts, but confined that finality to matters not touching the King. It is obvious that a similar effect may well be given to the words which render final the decisions of the Court of Delegates. Indeed, it was admitted at the Bar, and could not be denied, that this order of the sections rendered the case free from all doubt, and that the conclusion (if such were the order) would clearly be, that in cases touching the King, the appeal would be from the Archbishop's Court to the Court of Delegates. And, after considering the whole question, we are of opinion that, according to the true construction of the two statutes, there was an appeal, in all cases, (whether they touched the King or not), from the Archbishop's Court to the King in Chancery, and, therefore, that there now is an appeal to the Queen in Council.

This also appears to be the result of the most eminent of the authorities cited. In the 4 Inst. 337, Lord Coke says, (of the

Court of Arches), "From this Court, the appeal is to the King in Chancery, by the said Act of 25 Hen. VIII. c. 19;" (making no mention of any exception in a case touching the Crown). Again, in that part which treats of the Court of *Delegates, (p. 339), he says, "These Delegates do sit by force of the King's commission in three causes: first, when a sentence is given in any ecclesiastical cause by the Archbishop or his official," (again making no mention of any exception). And lastly, in treating of appeals (p. 340), he says, (quoting and adopting Lord Dyer's words), "Item, a general clause that all manner of appeals, (what matter soever they concern,) shall be made in such manner, form, and condition," within the realm, as it is above ordered by the 24 Hen. VIII., in the three causes aforesaid; and one further degree in appeals for all manner of causes is given, viz. from the Archbishop's Court to the King in his Chancery." So Com. Dig. tit. "Prærogative," D. 14, after setting out the section of the 25 Hen. VIII. c. 19, proceeds thus, "And therefore in all ecclesiastical causes an appeal lies to the Delegates." Blackstone (1) alone of all the authorities, says, "The appeal" (where the King himself is a party) "does not lie to the King in Chancery, which would be absurd; but, by the stat. 24 Hen. VIII. c. 12, to all the Bishops of the realm assembled in the Upper House of Convocation." The inaccurate manner in which the statute is quoted, affords strong ground for doubting the conclusion of the writer, and we think the authority of Lord Coke and of Chief Baron Comyns is not outweighed by this reference to Blackstone. Indeed, if the passage be taken to the letter, it confines the appeal to the Convocation to those cases in which the King himself is a party; and it is quite clear that her Majesty is not a party to these proceedings, and so it would be no authority in this case at all.

The Courts of Queen's Bench and Common Pleas came to the conclusion that the appeal to the Convocation was altogether abolished by the effect of the second statute. They both thought, that when by the express provision of *the 4th section in the 25 Hen. VIII. c. 19, a new appeal was given to all parties grieved without any exception, and a new tribunal was constituted for the purpose, and no further appeal was to be had or made from the same, this was in effect a repeal of the exceptional right of appeal given by the 24 Hen. VIII. in the particular cases of matters touching the Crown. And in support of this view of the case reliance was placed on the fact, that no appeal to Convocation ever

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(1) 3 Com. 67.

elapsed since the passing of these statutes ; and, on the other hand, it was shown, that in several cases since the reign of Henry VIII., (certainly in five, perhaps in more) in which the King was concerned, an appeal has been made to the Delegates, without objection.

The conclusion at which the Courts of Queen's Bench and Common Pleas have arrived seems to us so reasonable a construction of the statutes, explained as they are by subsequent usage and contradicted by no contrary practice, that but for the authority of Lord Coke, followed by a great number of other text-writers of eminence, we should at once have adopted it. We feel, however, that the authority of Lord Coke is not to be lightly disregarded ; and certainly in the 4th Institute he speaks of the Court of Convocation as a Court to which there was an appeal under the statutes in question in cases touching the King. This is expressly stated under the head of "Court of Convocation," in p. 323, and again under the head of "Appeals," in p. 339. It is true that in the latter passage Lord Coke is not speaking from his own mind, but is only giving the report of Lord Dyer ; but we think it must be inferred, that he meant to adopt as good law what he so states himself to have received from Lord Dyer. What Lord Coke thus states, namely, that in matters which touch the King there is an appeal to the Upper House of Convocation, has been adopted by a great number of writers of the highest eminence, including Lord Chief Baron Comyns, Ayliffe in *his "Parergon," and others. These subsequent authorities, it was said, do not add anything to the weight of the original authority of Lord Coke, from whom they obviously took their law ; nor do they, save only that their adoption of what had been laid down by Lord Coke proves that they did not doubt its accuracy. It was indeed a matter of little or no practical importance, and in all probability they adopted Lord Coke's authority without much or perhaps any investigation. Still the result of the whole is, that Lord Coke, writing long after the reign of Henry VIII., says there is in matters touching the King an appeal to the Convocation, and many subsequent text-writers of great eminence down to very modern times assert the same. In the present case this is rather matter of curious speculation than of any practical importance, for in either view of the case, the proceedings before the Judicial Committee were well founded, and in either view of the case there can now be no further appeal. If the second statute, 25 Hen. VIII. c. 19, repealed the 9th section of the

former statute, the proceedings questioned by the present application are perfectly regular. So, if the second statute merely gave a further appeal in all cases to the Delegates, equally the proceedings before the Judicial Committee now questioned are regular, and there can now be no further appeal of any sort, as the 3rd section of the 2 & 3 Will. IV. c. 92, expressly makes the judgment, order, or decree under that statute, final and definitive.

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If we were compelled to decide this question, we should probably come to the same conclusion as the other Courts of Westminster Hall, viz. that, in effect, the stat. 25 Hen. VIII. c. 19, did repeal the clause in the 24 Hen. VIII. c. 12, s. 9, which, in causes touching the Crown, gave an appeal to the Convocation. There is on the one hand what appears to us to be a reasonable construction of the statute, supported by all the practice that is known to exist on the subject, and opposed by none. On the other hand, there is the authority *of Lord Coke and the text-writers, that some appeal did exist to the prelates of the Upper House, in causes touching the King. But as we have observed, this is now practically of no importance. The question before us is not whether there was, after the passing of the 25 Hen. VIII. c. 19, some appeal to the Convocation, in some stage of causes touching the King, but whether in all manner of (ecclesiastical) causes, there was an appeal from the Archbishop's Court to the King in Chancery; and we think there was, and that, therefore, there now is to the Queen in Council. Our judgment is founded on what we hold to be the true construction of the Act, and on the eminent authorities already referred to, which it has been incorrectly stated lead to a contrary conclusion.

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The view we have taken may be fortified by some matters presented to us in the course of the argument. The section of the 25 Hen. VIII. c. 19, which gives the appeal to the Delegates, expressly says, "A commission shall be directed like as in case of appeal from the Admiral's Court." Now it is well known that the appeal from the Court of Admiralty to the Delegates has always been of all manner of causes, whether touching the Crown or not. It was further noticed, that in the Irish statute 28 Hen. VIII. c. 6, following the course (very generally adopted) of assimilating the law of Ireland to the law of England, the appeal to Rome is taken away, and an appeal given precisely according to the construction of the English statutes adopted by the Courts of Queen's Bench and Common Pleas. It is true, there may not have been a

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this country; but there certainly was a Convocation; and undoubtedly there were "spiritual prelates" to whom the appeal might have been given, if it were necessary (as it was generally thought to be) to assimilate the practice in Ireland with the practice in England, and if in fact there was an appeal in England to the spiritual prelates in the Convocation here. Lastly, we may remark *that the stat. 25 Hen. VIII. c. 19, by giving the appeals in all causes ecclesiastical from the Archdeacon to the Bishop or Ordinary, and from him to the Metropolitan or Archbishop, and from him to the King, and no further, (if such was the effect of the statute), did but restore the ancient law of the land as settled, on this point, by the Constitutions of Clarendon, in the reign of Hen. II. A.D. 1164. The Constitutions of Clarendon were directed against the encroachments of ecclesiastical power, and the usurpations of the papal authority; and next to the Great Charter itself, they have been always considered as a security for the independence of the kingdom, and the liberty of its subjects. These last observations would not, of themselves, be sufficient to support our decision; but they add strength and reason to the authorities we have cited, and they illustrate the construction of the statutes which we have felt ourselves bound to adopt.

On the whole, therefore, entertaining, as we do, no doubt upon the question before us, and concurring with the other Courts of Westminster Hall, and, as far as we know, with every Judge of all the Courts, we do not think that we should be justified in creating the delay and expense of further proceedings with a view to take the opinion of the House of Lords; and our judgment is, that the rule be discharged with costs.

Rule discharged, with costs.

1850.
May 3, 29.
July 8.

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(5 Ex. 683—695; S. C. 19 L. J. Ex. 366.)

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By deed, certain estates were settled to the use of such person or persons, in such parts, shares, and proportions, manner, and form, and for such ends, intents, and purposes, and under and subject to such powers, provisions, and limitations as S. S. should, by deed, as therein mentioned, or

(1) See the opinion of the Court of subsequent proceedings in Chancery, Common Pleas upon the same case, 4 De G. & Sm. 294. 79 R. R. 809 (8 C. B. 905), and the

by her last will and testament, or any writing purporting to be or in the nature of a last will and testament, to be by her signed and published in the presence of and attested by two or more credible witnesses, and which she was thereby authorised to make and execute, direct or appoint.

S. S., by her will, dated in 1826, (in which year the testatrix died), devised the estate to certain persons, and appointed executors, and signed and sealed her said will. The attestation clause was as follows: "Signed and sealed in the presence of H. O., of &c., and M. E., of &c."

Held, that, as sealing the will in the presence of two witnesses amounted to a publication of it, the attestation sufficiently expressed that the will was published, and that the publication was attested as required by the power, and, therefore, that the power was well executed.

THIS was a special case sent for the opinion of this Court by Vice-Chancellor WIGRAM.

Prior to and in contemplation of the marriage then intended, and soon afterwards solemnized between the Rev. John Ireland, clerk, afterwards Dean of Westminster, deceased, and Susanna Short, spinster, also deceased, by indentures of lease and release and settlement, the release and settlement bearing date the 28th of January, 1794, a certain freehold estate, held for certain lives still in existence, and limited in its creation to the lessee, his executors, administrators, and assigns, was conveyed to the trustees of the said settlement, their executors, administrators, and assigns, to certain uses in favour of the said John Ireland and Susanna Short, and their issue, which have since failed, and after the determination thereof, to the uses following, that is to say, "to the use of such person or persons, in such parts, shares and proportions, manner and form, and for such ends, intents and purposes, and under and subject to such powers, provisoes, and limitations, as the said Susanna Short shall, at any time or times, during and notwithstanding her intended coverture, by any deed or deeds, writing or writings, with or without power of revocation, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing purporting to be or in the nature of her last will and testament, to be by her signed and published in the presence of and attested by the like number of witnesses, and which deed or deeds and will she *is hereby authorised to make and execute notwithstanding her said intended coverture, direct or appoint, and in default of and subject to such direction or appointment, to the use of the said John Ireland, his executors, administrators and assigns, for their own use and benefit, and to no other use and intent or purpose whatsoever."

The said Susanna Ireland (formerly Susanna Short) made and executed her last will and testament in writing, or appointment in

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writing in the nature of a will, dated February 17, 1826, whereby she devised the said estate comprised in the said settlement after the death of her said husband, to certain of her relations in her said will named, and she appointed her executors, and concluded her said will, in the words and figures and form following, that is to say: "I appoint for executors of this my will the Rev. Thomas Vowler Short, the Rev. William Short (my two nephews), and Ralph Barnes, Esq., attorney-at-law, executor.

"SUSANNA IRELAND, (L.S.).

"February 17, 1826.

"Signed and sealed in the presence of Humphrey Pritchett, apothecary, 13, Great Queen Street, Westminster, Mary Eames, housekeeper to Mrs. Ireland."

The said Susanna departed this life on the 1st of November, 1826, and in the lifetime of her said husband, without having altered or revoked her said will, which has been duly proved, pursuant to an Order of her Majesty in Council, made on the 4th of March, 1847, confirming a report of the Judicial Committee of the Privy Council in a case of appeal from a sentence of the Prerogative Court of the Archbishop of Canterbury. The said John Ireland has also departed this life. In this suit, which is depending in the Court of Chancery, between the executors of the said John Ireland and executors of the said Susanna Ireland, and other persons interested in their respective estates, it has become necessary to determine whether the said will of *the said Susanna Ireland is a valid exercise of the power of appointment of the said estate, which was so given or limited to her by the said release and settlement of the 28th of January, 1794, as aforesaid.

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The case then proceeded to set out certain evidence to establish a publication of the will; but the plaintiff's counsel admitted that there had been such a publication of the will.

The question for the opinion of the Court was, whether the said Susanna Ireland's will, or appointment in the nature of a will, was a due execution of the said power of appointment so limited or given to the said Susanna Ireland by or contained in the said indenture of release of the 28th of January, 1794.

The case was argued in last Easter Term (May 3), and Trinity Term (May 29), by

Malins for the plaintiff:

The plaintiff admits that there has been a publication in fact of

Susanna Ireland's will, or appointment in the nature of a will, but contends that the instrument in question was not a due execution of the power of appointment given to her by the indenture of release and settlement of the 28th of January, 1794. By the terms of that deed, the publication of the will must be attested. There is an absence of such attestation here. In *Wright v. Wakeford* (1), which was sent by Lord ELDON (2) for the opinion of the Court of Common Pleas, it was held by the majority of the COURT, *dissentiente* MANSFIELD, Ch. J., that a mere direction that a deed shall be under the hand and seal of a party, attested by witnesses, requires the attestation signed by the witnesses to express that the deed was both signed and sealed in their presence. In that case the power was required to be executed "with the consent of Thomas Wood the elder and Thomas Wood the younger, testified by any writing under their hands and seals, attested by two *or more credible witnesses." The attestation contained the words "sealed and delivered" only, and was held to be insufficient. In *Doe v. Peach* (3), the Court of King's Bench ruled in compliance with the preceding case, at the same time expressing the respect they entertained for the opinion of MANSFIELD, Ch. J. Lord ELLENBOROUGH, Ch. J., there said, in delivering the judgment of the COURT, "It seems to us, that, to make a due execution of the power, there must be a making of an instrument with all the forms required by the power, and that there must be an attestation of its execution with all those forms." These cases were followed by *Wright v. Barlow* (4), in which the Court of King's Bench adhered to their previous decisions, and said, that they felt themselves bound by *Doe v. Peach*. These cases settled the question as to deeds. In *Moodie v. Reid* (5), a power to be executed by will or any writing or appointment in the nature of a will, to be signed and published in the presence of and attested by two or more credible witnesses, was held to be not well executed by a will signed by the donee, and attested thus: Witness B. H. and J. H." The last words of the will were, "these my last bequests signed by me," &c., and then the word "witness" and the names of the witnesses followed. Lord Ch. J. GIBBS held, that the witnesses had clearly attested the signing, but that there was no attestation of the publication. The learned CHIEF JUSTICE there says, that he does not clearly understand what the publication of a

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(1) 4 Taunt. 213; see p. 837, below.

(2) 17 Ves. Jr. 454.

(3) 15 R. B. 361 (2 M. & S. 576).

(4) 16 R. B. 339 (3 M. & S. 512).

(5) 16 R. B. 257 (1 Madd. 516; S. C.

7 Taunt. 355).

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designates that he means to give effect to a paper as his will ; and the observations of Sir JOHN LEACH, in *Stanhope v. Keir* (1), are to the same effect. In *Doe v. Pierce* (2), it was held, that a power to appoint by deed or writing under the donee's hand *and seal, and attested by two or more credible witnesses, was not properly pursued by a will, apparently under the testator's hand and seal, which seal an attesting witness believed was affixed before execution and attestation, if the attestation did not notice the sealing as well as the signing ; the Court holding the case to be undistinguishable from that of *Wright v. Wakeford*. The cases of *Allen v. Bradshaw* (3), and *George v. Rielly* (4), may also be referred to as bearing upon this subject. The case of *Mackinley v. Sison* (5), will no doubt be relied upon by the defendants ; there Vice-Chancellor SHADWELL said, "The next question is as to the execution of the power. The father's will requires that the power shall be exercised by his daughter, either by a deed or instrument in writing to be by her sealed and delivered in the presence of and to be attested by two or more witnesses, or by her last will and testament in writing, or any writing purporting to be or being in the nature of her last will and testament, to be by her signed and published in the presence of and to be attested by the like number of witnesses. Now I find no legal definition or explanation of the meaning of the term 'publication ;' and therefore, if it appears that a testatrix has produced her will to witnesses, and has signed and sealed it in their presence, and they have attested that she has done so, I must take it that she has published the document in their presence. I am of opinion, therefore, that the power has been duly exercised in point of form." The correctness of that decision is questionable, as several of the most important authorities upon the point were not cited. In *Waterman v. Smith* (6), it was held to make no difference that the deed was to be executed in the presence of and attested by the witnesses, although it was insisted that the execution was the thing to be attested ; *but there Vice-Chancellor SHADWELL said, that the question was quite different from the question as to publication. In *Ward v. Swift* (7), the instrument was signed, sealed, and delivered, as and for the last will and testament of the testatrix,

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(1) 2 Sim. & St. 37.

(2) 16 R. R. 634 (6 Taunt. 402).

(3) 1 Curt. 110.

(4) 2 Curt. 1.

(5) 42 R. R. 240 (8 Sim. 561).

(6) 9 Sim. 629.

(7) 1 Cr. & M. 171.

the power which required the publication to be attested was well executed. That case is therefore clearly distinguishable from the present. *Warren v. Postlethwaite* (1), and *Lempriere v. Valpy* (2), may be relied upon by the defendants. In *Burdett v. Spilsbury* (3), lands were limited to such uses, &c., as L. H. W. should appoint by her last will and testament in writing, to be by her signed, sealed, and published in the presence of and attested by three or more credible witnesses. L. H. W. signed and sealed an instrument, containing an appointment, which commenced thus: "I, L. H. W., do publish and declare this to be my last will and testament;" and it ended thus: "I declare this only to be my last will and testament; in witness whereof, I have to this my last will and testament set my hand and seal, the 12th of September" &c. The attestation was thus: "Witness C. B., E. B., A. B.," and the House of Lords held that the power was well executed. But there the publication appeared upon the face of the instrument, and the attestation was general. In the present case, the fact of publication does not so appear, and the attestation is confined to the signing and sealing of the instrument. A seal is not the badge of a will, but of a deed. And, although the witnesses saw the testatrix sign the instrument, they might have well considered it to have been a deed *inter vivos*. In *Bartholomew v. Harris* (4), the words of the attestation clause were, "We the undersigned attest to have seen the testator sign the above will;" and the VICE-CHANCELLOR there said, "that appears to me to be, of itself, a sufficient *testification by the witnesses, that they saw the testator sign what they knew to be his will; in what words it was communicated, or by what acts made known, is utterly indifferent."

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Humphry, for the defendant :

First, according to the language of this power, it is the instrument itself which is to be attested, and not the ceremony of publication. Secondly, publication is not of itself a specific act, but the result of a due execution of the testamentary instrument. Thirdly, even if publication be considered as a specific act, sealing is a publication within the terms of the power, and that is attested. The meaning of the word "publication," before the 1 Vict. c. 26, was settled by several authorities. *Curteis v. Kenrick* (5) decided that delivery was

(1) 1 Coll. C. C. 171.

(4) 15 Sim. 78.

(2) 5 Sim. 108.

(5) 3 M. & W. 461.

(3) 59 B. R. 105 (10 Cl. & Fin. 340).

Spilsbury v. Burdett (1), COLTMAN, J., observes, that in none of the cases respecting the execution of powers "have the instruments been held to be well executed unless the attestation itself, either stated in express terms, or showed by equivalent expressions, that the requisite conditions had been complied with." And ALDERSON, B., there says (2), that any words in the attestation, showing the will or instrument to have been completed as an operative instrument, will satisfy the word 'published,' or the word 'delivered,' in a power. In Viner's Abridg. "Devise," (N. 2), pl. 16, it is said, "upon a trial at Bar in this Court, in an issue out of chancery, first, it was resolved by the whole Court, that if a man draws up his own will and sends it to counsel to be advised of the legality of it, this is no will unless it has a publication after he receives it back from his counsel. Secondly, it was resolved, that, if after his will came from counsel with alterations made by counsel, the party puts his seal to it, or subscribes his name, or writes upon it 'This is my will,' *though there be no witnesses to it, yet this is a good publication, because any of those declare his intent that that should be his will." In the same work, "Devise" (N. 7), pl. 12, reference is made to a case of *Peate v. Ougley* (3), which decided, that, since the 29 Car. II. c. 3, s. 5, "there is no necessity that the witnesses see the testator write his name; and if he writes these words, 'signed, sealed, and published as his will,' and prays the witnesses to subscribe their names to that, it will be a sufficient publication of his will, though the witnesses do not hear him declare it to be his will." And Sir J. Holles mentioned a case determined by Lord Chancellor SHAFTESBURY before the 29 Car. II., where a man wrote his will with his own hand, and also these words, "signed, sealed, and published in the presence of," and no witnesses had subscribed it, it was held to be "a sufficient publication." *Wallis v. Wallis*, T. 1762, cited in 4 Burn's Eccles. Law, p. 100, 9th ed., is an authority to the same effect. In *Trunmer v. Jackson*, also cited in 4 Burn's Eccles. Law, p. 102, "the witnesses were deceived by the testator at the time of the execution, and were led to believe, from the words used by the testator at the execution of the instrument, that it was a deed and not a will. It was delivered as his act and deed; and the words "sealed and delivered" were put above the place where the witnesses were to subscribe their names. And it was adjudged by

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(1) 9 Ad. & El. 942.
(2) 9 Ad. & El. 957.

(3) Comyns, 197.

families, from having it known that a person had made his will, that this was a sufficient execution." Also in *White v. Trustees of the British Museum* (1), it was held that a will of lands, subscribed by three witnesses in the presence and at the request of the testator, is sufficiently attested within the Statute of Frauds, although none of the witnesses saw the testator's signature, and only one of them knew what the paper was. *Mackinley v. *Sison* (2) is an express authority that sealing is equivalent to delivery, for the purpose of publication. There the testator bequeathed a certain sum in trust for his daughter for life, and after her decease in trust for such persons as she should by deed or will, signed and published by her in the presence of and attested by two witnesses, appoint. The daughter made a will, which was expressed to be signed and sealed only, but which was attested by three witnesses; and that was held a due execution of the power. In *Barnes v. Vincent* (3), Vice-Chancellor KNIGHT BRUCE asked "What is held to amount to a publication in the Ecclesiastical Courts? Is declaration of testamentary intention sufficient?" During the lifetime of the testator, publication may be said to be potential only, and it is the death which completes it. Where a widow, after the death of her husband, delivered a will made during coverture to her executor for safe custody, such delivery, coupled with other recognitions, was held to amount in a court of probate to republication: *Müller v. Brown* (4). An award is "published" when it is executed by the arbitrator in the presence of and attested by witnesses: *Brooke v. Mitchell* (5). In like manner a will is "published" when the testator has done some act indicating that the instrument is complete. In Roberts on Wills, sect. 2, p. 100, it is said, "the term itself (publication) seems never to have borne any very precise or appropriate meaning, or to have indicated any certain and fixed form." Where a testatrix called the witnesses to attest her will, sealed it, and declared it to be her act; that was held a "publication" within the meaning of a power which required the will to be signed and published in the presence of witnesses: *Warren v. Postlethwaite* (6). Sealing for this purpose must be considered equipotent with *delivery. In Johnson's Dictionary the word "seal" is defined as "any act of confirmation." The authorities relied on by the plaintiff are

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(1) 6 Bing. 310.

(2) 42 R. R. 240 (8 Sim. 561).

(3) 70 R. R. 36 (5 Moo. P. C. 205).

(4) 2 Hagg. Eccl. Rep. 209.

(5) 55 R. R. 699 (6 M. & W. 473).

(6) 70 R. R. 157 (2 Coll. C. C. 108).

no question arose as to publication. In *Doe v. Pierce* (2) the attestation noticed the signing but omitted the sealing, which the power required to be attested. In *Moodie v. Reid* (3) the attestation did not point to the publication; and, besides, both that case and *Stanhope v. Keir* (4) may be considered as overruled by *Doe d. Spilsbury v. Burdett* (5). (He then referred to passages in the judgments of ALDERSON, B., and PARKE, B., as reported in 9 Ad. & El. 954, 956, 957, 971, and the judgments of WIGHTMAN, J., ERSKINE, J., and PATTESON, J., in that case, as reported in 10 Cl. & Fin. 346, 368, 371, 396.)

Malins, in reply :

The term "publication" imports that the witnesses were informed at the time of attestation that the instrument was a testamentary instrument. The law on this subject has been settled by a series of authorities, which are recognised as binding in *Doe d. Spilsbury v. Burdett* (5). The cases of *Wright v. Wakeford* (6), *Stanhope v. Keir* (4), and *Doe v. Pierce* (2) show that not merely the instrument but also the ceremony of publication must be attested. Since the Statute of Frauds, the witnesses attest all that is necessary to give the deed validity, viz. the ceremony of its execution. So here the witnesses must attest all that is required to be done by the donee of the power. "Publication," without signing, would be of no avail, then how can signing be sufficient without publication? If this had been a deed *inter vivos*, and the attestation had gone to the sealing only, or to the delivery only, that would not have been a valid execution of the power: *Buller v. Burt* (7). *Sealing is no publication, for it does not communicate to the witnesses that the instrument is to operate after the death of the party executing it, but rather raises a presumption the other way. Besides, sealing was not required by the power, and was therefore a mere nugatory act. (He also referred to *Simeon v. Simeon* (8), *Bartholomew v. Harris* (9).)

Cur. adv. vult.

The judgment of the COURT was now delivered by

(1) 9 Sim. 629.

(2) 16 R. R. 634 (6 Taunt. 402).

(3) 16 R. R. 257 (1 Madd. 516).

(4) 2 Sim. & St. 37.

(5) 9 Ad. & El. 936.

(6) 4 Taunt. 213.

(7) Cited, 4 Ad. & El. 15.

(8) 4 Sim. 555.

(9) 15 Sim. 78.

We shall certify, in this case, to the VICE-CHANCELLOR, that we are of opinion that the power was well executed.

By the settlement, on the marriage of the Dean of Westminster with Miss Susanna Short, a power was given to that lady, during coverture, by any deed, sealed and delivered in the presence of and attested by two or more witnesses, or by her last will signed and published in the presence of and attested by two or more witnesses, to appoint certain property therein mentioned to such uses as she might choose.

It appears that, by her will, dated the 17th February, 1826, she made such appointment. The attestation clause is as follows: "Signed and sealed in the presence of Humphrey Pritchett" and "Mary Eames."

The question is, whether this is sufficient. It depends on the state in which the law was left by the case of *Burdett v. Spilsbury*, in the House of Lords. We are unable to see how, after that decision, the law previously considered to be established by the well-known case of *Wright v. Wakeford* can be considered as in force. It seems to us that it was by the decision of *Burdett v. Spilsbury* really overruled. Now, if that be so, it would be quite clear that this power was well executed. But we are embarrassed by *certain dicta of the noble Lords by whom the decision of *Doe v. Spilsbury* was pronounced, in which they say they do not mean to overrule *Wright v. Wakeford*, but leave its authority untouched, and to confine their decision to the cases where the attestation is general, and omits altogether all mention of the formalities required by the power to be attested. But, even if this be so, we still think this power was well executed. It is conceded that the attestation need not follow the words of the power literally. Where the power given is to be exercised by signing and publishing a will, and by having an attestation of both these formalities, it would clearly be well executed, if the attestation expressed that it was signed and delivered; and this was expressly so determined by this Court in the case of *Ward v. Swift*, and by Vice-Chancellor SHADWELL in *Simeon v. Simeon*.

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Now what is the principle which governs these decisions? We think it is this; that if the attestation express, in any form of words, an act to have been done in the presence of witnesses, by which the complete execution of the instrument, as required by the power, appears to have been effected, it will be sufficient; but

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that, where the framer of the power requires two or more such acts to be done, then if the attestation expresses only the doing of one of them, even though all persons would clearly infer that the other act had also taken place, it will not be sufficient. For in this latter case, it is clear that the framer of the power really intends something more than the act expressed in the attestation, because he has expressly added the other. Thus, in this case, he requires both signing and publishing. The signing, therefore, in the presence of witnesses, though it might naturally and reasonably be also called a publishing, will not alone do, for he expressly says, the will is to be signed in the presence of witnesses, and also published. But here it is both signed and sealed in their presence. Now if sealing in the presence of witnesses be naturally and reasonably to be considered as a publication, and we think it may be so

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*considered, then we have enough in this attestation to fulfil the whole power, for it is signed in the presence of two witnesses, and it is published also, if being sealed in the presence of witnesses amounts to a publication. And both these acts are here stated in the attestation.

We therefore think, for these reasons, that this power was well executed, and shall certify accordingly.

The following Certificate was afterwards sent to the Vice-Chancellor (1) :

“ We have heard this case argued by counsel, and have considered it; and we are of opinion that the said Susanna Ireland's will, or appointment in the nature of a will, was a due execution of the power of appointment limited or given to her by and contained in the indenture of settlement dated January 28, 1794.

“ FRED. POLLOCK.

“ E. F. ALDERSON.

“ R. M. ROLFE.

“ T. J. PLATT.”

(1) The following Certificate had been previously sent to the Vice-Chancellor by the Court of Common Pleas upon a case sent for the opinion of that Court :

“ This case has been argued before us, and we are of opinion that Susanna Ireland's will (or appointment in the nature of a will) was a due execution

of the power of appointment, limited or given to her by and contained in the indenture of release and settlement of the 28th of January, 1794.”

“ THOS. WILDE,

“ W. H. MAULE,

“ C. CRESSWELL,

“ E. V. WILLIAMS.”

“ May 5, 1819.”

IN THE EXCHEQUER CHAMBER.

(IN ERROR FROM THE COURT OF EXCHEQUER.)

THAMES HAVEN DOCK, &c. COMPANY *v.* BRYMER (1).

(5 Ex. 696—712; S. C. 19 L. J. Ex. 321.)

1850.
Feb. 7.
June 17.

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A declaration in covenant by the assignees of B., a bankrupt, stated, that by a deed between B. of the first part; D. and S. his wife, of the second part; V. and the said B., described as trustees, of the third part; and the Thames Haven Dock and Railway Company, the defendants, of the fourth part; after reciting that certain persons on behalf of the Company had agreed to buy certain premises, and that B. had agreed to sell the same, it was witnessed, that, in consideration of a certain sum already paid to B., and in consideration of the further sum of 2,936*l.* to be paid to B., and to V. and B., according to their respective rights and interests in the premises, on or before the 25th of March, 1844, B., D., S., and V. agreed to sell the premises; and that B. would, at his own expense, deduce a good title to the same; and that B., and all other necessary parties, would, on or before the said 25th of March, on payment by the Company of the said sum of 2,936*l.*, at the costs and charges of the Company, execute and procure to be executed a proper conveyance for conveying the fee-simple of the premises; and that the Company thereby agreed with B. that they would, on or before the said 25th of March, and on the execution of such conveyance, pay the said sum of 2,936*l.*, and until payment of the said sum would pay interest on the same to B. and his assigns; that the 25th of March had elapsed, and although B. before his bankruptcy, and the plaintiffs as his assignees after it, were willing and ready to deduce a good title, and though B. and the necessary parties were ready and willing, on payment by the defendants of the said sum of 2,936*l.*, to execute a conveyance, and would have done so, but that the defendants discharged B. and the plaintiffs from deducing such good title, and from executing such conveyance. The declaration then alleged as a breach, that the defendants did not prepare a proper conveyance, nor pay to B. or to the plaintiffs the sum of 2,936*l.*, or any part thereof: Held, on error, affirming the judgment of the Court of Exchequer, on special demurrer to the declaration, first, that the assignees of a bankrupt, suing on a deed made to the bankrupt, are not bound to make *profert* of the deed; secondly, that the breach, that the defendants had not prepared the conveyance nor paid the money, was good, for, as the deed provided that the conveyance was to be at the costs and charges of the defendants, it lay on them to prepare it; thirdly, that the execution of the conveyance and the payment of the money were concurrent acts; but that the deduction of a good title by B. was necessarily a condition precedent to the preparation of the conveyance, as the conveyance could not be properly prepared until the title was deduced; fourthly, that the averment that the defendants discharged B. and the plaintiffs from deducing title, though not alleged to have been under seal, was sufficient on general demurrer; and, lastly, that it was not necessary to point out the respective interests of B. and others in the money to be paid, as the covenant was not a covenant to pay the principal sum to B. and the others according to their respective interests, and the interest to B., but was a covenant to pay to B. both principal and interest.

THIS was a writ of error brought upon a judgment of the Court of Exchequer (2). It was an action of covenant, brought by the

(1) Cited, *Young v. Austen* (1869) 233, 20 L. T. 396.
L. R. 4 C. P. 553, 557, 38 L. J. C. P. (2) 2 Ex. 549.

against the defendants below, on a deed made to the bankrupt.

The declaration stated "that whereas, heretofore and before *the said W. Bromley became bankrupt, to wit, on the 22nd of April, 1841, by a certain deed then made and entered into between the said W. Bromley, of the first part; one George Dyer, Esq., and Sarah Ann his wife, of the second part; one Petty Vaughan and the said W. Bromley, therein described as trustees under the marriage settlement of the said G. Dyer and Sarah Ann his wife, of a sum of 2,800*l.* secured to the said S. A. Dyer by a mortgage of the hereditaments thereafter mentioned, of the third part; and the said Company of the fourth part: After reciting that by certain conditions of sale, the premises thereafter and hereinafter mentioned had been advertised to be sold by auction on the 27th of May, 1836, unless an acceptable offer were previously made by private contract, and that by a memorandum indorsed on one of the said particulars and conditions of sale, dated 17th of May, 1836, James Lamnerez Jephson, Esq., and Ernest Vaux, Esq., therein respectively described, on behalf of themselves and the other members of the committee of the said therein proposed Thames Haven Railway Company, agreed to purchase the said premises at the sum of 5,000*l.* and to complete the same agreeably to the conditions of sale, provided the bill then in Parliament for such railway should pass into a law, and the said W. Bromley agreed to sell the same; and after further reciting that the said Railway Company obtained such Act of Parliament, and had entered into the arrangement thereafter and hereinafter mentioned for the payment of the said purchase-money, &c.: It was witnessed, that in consideration of the sum of 2,500*l.*, at the time of the execution of that agreement paid to the said W. Bromley, by the consent and with the approbation of the said G. Dyer and Sarah Ann his wife, and the said P. Vaughan, and in consideration of the further sum of 2,936*l.* 17*s.* 9*d.* to be paid to the said W. Bromley, and to the said P. Vaughan and W. Bromley, according to their respective rights and interests in the premises, on or before *the 25th of March, 1844, the said W. Bromley, G. Dyer and Sarah Ann his wife, and P. Vaughan thereby agreed with the said Company, the now defendants, to sell to them certain messuages, lands and premises, with the appurtenances in the said deed particularly mentioned; and that the said W. Bromley would, at his own expense, except so far as the same was otherwise provided for by the said Act in cases of lands taken and purchased by the said Company, deduce a good

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title to the said hereditaments and premises, subject to the conditions following, that is to say, &c.; and that the said W. Bromley, and his heirs and assigns, and all other necessary parties, would, on or before the said 25th of March, 1844, on payment by the said Company of the said sum of 2,936*l.* 17*s.* 9*d.*, at the costs and charges of the said Company, their successors and assigns, execute and procure to be executed a proper conveyance for conveying and assuring the fee simple and inheritance of and in the said hereditaments, with their appurtenances, unto the said Company, their successors and assigns, free from all incumbrances except the payment of an annual quit-rent of 2*l.* 14*s.* and land tax. And the said Company thereby agreed with the said W. Bromley and his assigns, that they, their successors or assigns, would, on or before the said 25th of March, 1844, and on the execution of such conveyance as aforesaid, pay the said sum of 2,936*l.* 17*s.* 9*d.*, and would in the meantime, and until the payment of the said 2,936*l.* 17*s.* 9*d.*, pay interest upon the same sum after the rate of 5*l.* for every 100*l.* by the year, by equal half-yearly payments, on the 25th of March and the 25th of September in every year, until the said W. Bromley, his executors, administrators, and assigns, &c.; and that the said 25th of March, A.D. 1844, had elapsed before the commencement of this suit. And although the said W. Bromley, before he became bankrupt, and the plaintiffs as assignees as aforesaid after such bankruptcy, for a long time before, and on and after the said 25th of March, 1844, were *respectively ready and willing, at the expense of him the said W. Bromley, before he became bankrupt, and of the plaintiffs as assignees after such bankruptcy, except so far as the same has been otherwise provided for by the said Act in cases of land taken and purchased by the said Company, to deduce a good title to the said hereditaments and premises, subject to the said conditions in the said deed mentioned in that behalf; and although the said W. Bromley, and his heirs and assigns, and all other necessary parties, for a long time before and on the 25th of March, A.D. 1844, were ready and willing, on or before the day and year last aforesaid, on payment by the said Company of the said sum of 2,936*l.* 17*s.* 9*d.*, at the costs and charges of the said Company, their successors or assigns, to execute and procure to be executed a proper conveyance for conveying and assuring the fee simple and inheritance of and in the said hereditaments, with their appurtenances, unto the said Company, their successors and assigns, free from all incumbrances,

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tax; and although the said W. Bromley, before he became bankrupt, and the plaintiffs as assignees as aforesaid after such bankruptcy, during all the time in that behalf aforesaid, would, at such expense as in that behalf aforesaid, except as aforesaid, have deduced a good title to the said hereditaments and premises, subject as in that behalf aforesaid; and the said W. Bromley and his heirs and assigns, and all other necessary parties, during all the time in that behalf aforesaid, would have executed and procured to be executed a proper conveyance for conveying and assuring the fee simple and inheritance aforesaid unto the said Company as aforesaid, free from all incumbrances except as aforesaid, of all which the said Company, to wit, on the said 25th of March, 1844, and long before, that is to say, from the day of executing the said deed, continually had notice; but that the said Company, to wit, on the said 25th of March, 1844, discharged *the said W. Bromley and the plaintiffs, as such assignees as aforesaid, from deducing such good title as aforesaid, and from the execution of such conveyance as aforesaid. Yet the said Company did not nor would regard or keep their said covenant in that behalf, and did not nor would prepare such proper conveyance as aforesaid, for such execution as aforesaid, or otherwise; nor pay to the said W. Bromley, or to the plaintiffs, as such assignees as aforesaid, the said sum of 2,936*l.* 17*s.* 9*d.*, or any part thereof; and have altogether neglected and refused so to do," &c.

The declaration contained a second breach, which was abandoned in this Court and in the Court below by the plaintiffs' counsel.

The defendants below demurred specially to this declaration, but the only objection pointed out by the special demurrer was the want of *profert*.

The case was argued in this Court (Feb. 7) (1), by

Peacock for the plaintiffs in error, the defendants below :

The declaration is bad on several grounds. In the first place, there is no averment of *profert* of the deed on which the plaintiffs below sue, and there is no excuse for want of *profert*. * * *

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Secondly, the breach is bad. The defendants below were not bound by the terms of the covenant to prepare the conveyance.

(1) Before Patteson, J., Coleridge, J., Wightman, J., Cresswell, J., and Williams, J.

The payment is to be made by them upon the execution of the conveyance; no doubt, if they had sued the bankrupt for not executing the conveyance, they must have previously tendered him a conveyance for his execution. In Sugden's Vendors and Purchasers, p. 260, 11th edit., it is said, that "in agreements for purchase, the covenants are construed according to the intent of the parties, and they are therefore always considered dependent where a contrary intention does not appear." . . . "If, therefore, either a vendor or vendee wish to compel the other to observe a contract, he immediately makes his part of the agreement precedent; for he cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal."

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(COLERIDGE, J.: Is not the agreement that Bromley is to execute the conveyance at the costs and charges of the Company, an agreement that the Company are to prepare the deed?)

To enable either party to enforce the performance of the agreement, *it is necessary that the deed should be first prepared by the party who is desirous to enforce it. See *Standley v. Hemmington* (1), *Phillips v. Fielding* (2), and *Doe d. Clarke v. Stilwell* (3).

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(MAULE, J.: Such a construction would, as it appears to me, be contrary to the express terms of the contract, by which the vendee is to prepare the conveyance, and the vendor is merely to execute it and to receive the money.)

Thirdly, the declaration does not contain any averment that Bromley, or the assignees, deduced a good title, which is a condition precedent to their right to sue the Company. The purchasers could not tell what the title was; an abstract of title ought, therefore, to have been delivered to them. And the allegation that the Company discharged him does not state the discharge to have been under seal, and is therefore insufficient. The discharge must be effected by an instrument of as high a nature as that by which the liability is created: *Goss v. Lord Nugent* (4), *Harvey v. Grabham* (5).

(MAULE, J.: May it not be presumed that the discharge was effected by apt means?)

(1) 6 Taunt. 561.

(2) 2 H. Bl. 123.

(3) 8 Ad. & El. 645.

(4) 39 R. R. 392 (5 B. & Ad. 58).

(5) 44 R. R. 374 (5 Ad. & El. 61).

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The defective allegation might be cured by verdict, but the objection is good on general demurrer, or after judgment by default: *Collins v. Gibbs* (1), *Stennel v. Hogg* (2).

(MAULE, J. : In old times, before the statute of Anne, you might have taken any objection to the pleadings at common law; but that statute says, that there are certain objections of which you shall not be at liberty to avail yourself unless you specify them. Before that statute a demurrer was both general and special. But what statute is there by which a judgment on general demurrer and judgment by default are put upon the same footing?)

[*703] The *defect is one to which the statute of Anne does not apply; it is open to objection without being specifically pointed out. A verdict only cures these defects where the finding of the jury is upon the precise point. In *Bird v. Higginson* (3), in the Exchequer Chamber, the COURT said, that they could not assume on general demurrer that a demise of certain incorporeal hereditaments was by deed.

(MAULE, J. : In that case the demise might have had some operation if it had not been by deed, for it included corporeal as well as incorporeal hereditaments. But if a man says that he has granted a rent-charge, he must mean that he has done it by deed, for if it is not by deed it is nothing.)

This is a defective statement at common law, and is not cured by statute: *Harris v. Goodwyn* (4), *Patrick v. Balls* (5).

Fourthly, the breach for non-payment of the money is bad; for by the recital in the covenant, the payment of the purchase-money is to be made to Bromley and Vaughan according to their respective rights and interests in the premises. The declaration therefore should have contained a precise statement of the amount of the respective interests of the parties, and should have alleged that the Company had notice of the same. The Company were not able to determine what those rights were; that was a fact peculiarly within the notice of the vendors of the property. The covenant must be read as controlled by the recital: *Hesse v. Albert* (6).

(1) 2 Burr. 899.

(5) Carth. 390.

(2) 1 Wms. Saund. 228 a, note.

(6) 32 R. R. 725 (3 Man. & Ry.

(3) 6 Ad. & El. 824.

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(4) 2 Man. & G. 405.

(PATTESON, J.: The breach is, that the Company did not pay the money, or any part thereof, to Bromley. Now, as it is to be taken that Bromley had some interest, would not that be sufficient to support a nominal verdict?)

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The Company are not bound to pay any portion of the money until they are bound to pay the whole amount. As this matter was peculiarly in the vendors' *knowledge, notice ought to have been given of it to the other purchasers: *Vin. Abr. tit. "Notice," p. 5, pl. 12; Vyse v. Wakefield (1), Foxe v. Goodson (2), Webb v. Cowdall (3).*

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Cowling, for the defendants in error:

Assuming the deed to have been necessarily in the possession of the bankrupt, inasmuch as the action is brought by his assignees, they are not bound to make *profert*. * * *

Secondly. It has been objected, that the declaration is bad, for not averring that Bromley or the assignees tendered a conveyance for execution; but the language of the covenant, that Bromley would, "at the costs and charges of the Company," execute a conveyance, makes it perfectly clear that the Company were the party by whom the conveyance was to be prepared. The declaration alleges readiness and willingness *on the part of the vendor to execute it, and that averment is sufficient: *Laird v. Pim (4), Poole v. Hill (5), and 2 Saund. 252 b, note c.. Standley v. Hemmington (6)* was the case of an award; and it may be that the party who wishes to enforce the award by attachment cannot do so without first tendering a conveyance.

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(PATTESON, J.: You need not trouble yourself further upon this point, as we all think it perfectly clear that it was the duty of the Company to prepare the conveyance.)

Thirdly. The making a good title was not a condition precedent. On the 17th of May, 1836, the estate was purchased by the defendants below; and since that time they have treated the estate as conveyed to them. They paid part of the money, and agreed to pay the remainder at a given date on execution of the conveyance, and interest in the mean time. The covenant with respect to deducing title is not a condition precedent, but is an independent

(1) 55 R. R. 675 (6 M. & W. 442).

(2) Cro. Eliz. 276.

(3) 14 M. & W. 820.

(4) 56 R. R. 768 (7 M. & W. 474).

(5) 55 R. R. 805 (6 M. & W. 835).

(6) 6 Taunt. 561.

Cole (1), which is illustrated by the cases of *Wilks v. Smith* (2),
Dicker v. Jackson (3), and *Quarrington v. Arthur* (4).

(WILLIAMS, J. : The deduction of title may have been necessary as the foundation of the conveyance. What use would there be in deducing the title after the execution of the conveyance ?)

There is nothing to show that it was necessary to deduce the title in order to prepare the conveyance. No time is specified within which the title was to be deduced. But admitting it to be a condition precedent, the averment of discharge is sufficient. It is admitted that the discharge, in order to be valid, must be under seal; but this objection is on general demurrer, and therefore fails. If the objection had been pointed out on *special demurrer, it might have been otherwise. Upon a traverse of the discharge, it would become necessary to prove the discharge to have been by deed. The objection, therefore, goes rather to the evidence than to the averment.

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Lastly. The breach is good. This objection is upon general demurrer. By the language of the covenant, both principal and interest are to be paid to Bromley. The words "to the said Bromley," apply to the principal debt as well as to the interest payable thereon. It appears upon the face of the instrument what the respective rights of the parties were, and therefore no notice was necessary. Bromley was to receive all the money, to keep part for himself, and to hold the remainder as co-trustee with Vaughan. But even upon the assumption that such is not the proper construction of the deed, the breach is sufficient upon general demurrer, as it would be sufficient to sustain a verdict with nominal damages; for it is clear that Bromley had some interest, and therefore was entitled to a verdict for something.

Peacock, in reply :

With respect to *profert*, a party who comes in by operation of law is presumed to have the instrument, and must therefore either make *profert*, or allege a valid excuse for not making it. The assignees are in the same situation as the bankrupt himself with respect to defendants. * * *

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Secondly. The making out a good title is a condition precedent,

(1) 1 Wms. Saund. 319 e.

(2) 62 R. R. 650 (10 M. & W. 355).

(3) 77 R. R. 289 (6 C. B. 103).

(4) 62 R. R. 635 (10 M. & W. 335).

according to the case of *Glizebrook v. Woodrow* (1), where the covenant was similar to the present.

Lastly. The breach is bad. The words, that payment is to be made "to the said William Bromley," apply only to the payment of interest. The Company therefore could not safely make payments to the assignees without notice of the bankrupt's interest.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PATTERSON, J. :

This was an action of covenant by the assignees of William Bromley, a bankrupt, against the Company, upon a deed, by which Bromley agreed to sell, and the Company to purchase, certain lands. There was a special demurrer to the declaration.

Three points were argued before us: first, whether the assignees of a bankrupt, in suing on a deed made to the bankrupt, are bound to make *profert*, or excuse for not doing so.

Secondly, whether the breach which charged that the Company did not prepare a conveyance or pay the purchase-money, was well assigned.

Thirdly, whether the deducing a good title by Bromley was a condition precedent, and if it were, whether a sufficient discharge from doing so by the Company was shown.

As to the first question, * * the true rule seems to be, not that whoever has the deed, or a right to it, must make *profert*, but that whoever has the deed, or might have it but for his own default or *that of some one whose default binds him, must make *profert*.

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With respect to the second question, we all agreed on the argument, that, as the deed provides that the conveyance should be at the costs and charges of the Company, it lay on them to prepare it; and such is the general course as between vendor and purchaser: the breach, therefore, is well assigned.

The argument that the Company could not prepare a conveyance without an abstract of title, leads to the third question, whether the deducing title be a condition precedent. We agree with the Court of Common Pleas, in *Dicker v. Jackson*, that the rule is correctly laid down in the note to *Pordage v. Cole* (2), viz. that "if a day be

(1) 4 R. R. 700 (8 T. R. 366).

(2) 1 Wms. Saund. 320 b.

other act, and the day is to happen, or may happen, before the thing, which is the consideration of the money or other act, is to be performed, an action may be brought for the money, or for not doing such other act, before performance; for it appears that the party relied on his remedy, and did not intend to make the performance a condition precedent." Applying this rule to the present case, we find that the deed is dated the 22nd of April, 1841. The covenant of Bromley is to deduce a good title to the premises (not saying when), and, on or before the 25th of March, 1844, on payment by the Company of 2,936*l.* 17*s.* 9*d.* to execute a proper conveyance. The covenant of the Company is, on or before the 25th of March, 1844, and on the execution of such conveyance, to pay the money. It is plain, therefore, that the execution of the conveyance and the payment of the money were intended to be concurrent acts. The day for the payment of the money could not happen before the thing which was the consideration for it, viz. the execution of the conveyance, was to be performed. The conveyance was to be prepared by the Company. *So far as regards the execution of a conveyance by Bromley, an averment of readiness and willingness on his part to execute it, if it had been prepared by the Company, might be sufficient to entitle the assignees to maintain this action for not preparing the conveyance and paying the money; but the Company contend that they could not prepare a conveyance until a good title had been deduced by Bromley according to his covenant; therefore that such deduction of title was necessarily a condition precedent. We are of opinion that they are right in so contending. The recitals to be introduced into the conveyance, and even the names of the persons who were to be parties to it, could not be known to the Company with any certainty until the title had been deduced. Then follows the averment in the declaration, that Bromley and the assignees were ready to have deduced a good title, but that the Company discharged the said W. Bromley and the plaintiffs as such assignees as aforesaid from deducing such good title as aforesaid, and from the execution of such conveyance as aforesaid.

The Company contend that this averment is not sufficient, inasmuch as it is not shown that the discharge was by deed. This objection, however, is not pointed out as a special cause of demurrer. It is conceded by the learned counsel for the assignees, that the discharge would not be good unless it were by

deed; but he says, that if the averment had been traversed, it could not have been proved otherwise than by production and proof of a deed: *Goss v. Lord Nugent*; and so he contends that, on general demurrer, it must be taken to have been by deed, the only way in which it can be good; and so it was decided in the Court of Exchequer.

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HAVEN
DOCK,
&C. CO.
v.
BRYMER.

In *Harvey v. Grabham*, a similar objection arose on demurrer; but there it appeared on the pleadings that an agreement, necessarily in writing, had been partially waived by word of mouth. To make that case apply, the defendants should have pleaded that the discharge was by word of *mouth, or by an instrument not under seal. In *Collins v. Gibbs*, the objection arose in arrest of judgment, after interlocutory judgment by default; but that was a total omission to aver performance of a condition precedent, not an informal averment, as here. In *Bird v. Higginson*, on demurrer, the pleadings showed the instrument not to be under seal. In *Harris v. Goodwyn* to an action of covenant, a plea was pleaded, setting up a promise not to sue, which was traversed by the replication, and a verdict found for the defendant; but the COURT held the plaintiff entitled to judgment *non obstante veredicto*, for that they could not intend that the promise not to sue was by deed. The plea there was very special, and could not, by any reasonable construction, be held to import that there was a deed between the parties. Here the averment is in the most general terms, that the defendants discharged Bromley and the plaintiffs. In *Harris v. Goodwyn*, the plea alleged a promise and undertaking of the plaintiff; here the declaration alleges only the fact of discharging. Upon the whole, we think that the Court of Exchequer was right in holding the averment sufficient upon general demurrer.

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Another objection was taken to the breach, for informality in not pointing out the respective interests of Bromley and the other parties in the sum to be paid. This again was not pointed out as cause of demurrer, and we think that the words “unto the said William Bromley,” at the end of the covenant to pay the money, are to be read as referring to the principal money as well as the interest, which makes it unnecessary to point out what part of the money belonged to him and what to others, since the covenant is to pay the whole to him.

For these reasons, we are of opinion that the judgment must be affirmed.

Judgment affirmed.

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In an action of covenant upon a farming lease, the declaration alleged (*inter alia*) that the plaintiff and defendant did, by the said instrument, covenant and agree that the lessor (the defendant) should, within eighteen months from the date of the lease, build a new shed and stalls for feeding cattle complete, at the upper end of a certain barn, &c., the whole of which was agreed to be left to the superintendence of the lessee and the lessor's son: Held, on error (in affirmance of the opinion of the Court of Exchequer on motion to arrest the judgment,) that the stipulation in the lease, that the work should be left to the superintendence of the parties named, was not a condition precedent to or concurrent with the covenant on the part of the defendant to do the work.

Affirmed in H. L. (3 H. L. C. 700). Practice in the House of Lords as to formal affirmation of judgment below.

In this case (1), the Court of Exchequer having discharged the rule obtained by the defendant below to arrest the judgment, and judgment having been signed, and a writ of error having been brought thereon, the case was now argued (2) by

Atherton for the plaintiff in error, the defendant below :

The declaration is bad. The covenant alleged is, that the defendant agreed to erect certain buildings within the period of eighteen months, "the whole of which were to be left to the superintendence of the plaintiff and Edwin Jones, the defendant's son." Now it is submitted, that the superintendence of the plaintiff was a condition concurrent with the duty of the defendant to erect the buildings. The declaration therefore ought to have alleged, that the plaintiff was ready and willing to superintend the works; and it is bad because it does not contain that allegation. Where some act is required to be done on the part of the covenantee, at the same time as another act is to be done on the part of the covenantor, and an action is brought for the nonperformance by the covenantor of the act in question, the declaration must contain an allegation, that the covenantee was ready and willing to perform his part: 1 Wms. Saund. 320, notes, and 2 Wms. Saund. 352. The covenant is pleaded according to its legal effect; and if there be any ambiguity in the language of the covenant, such a construction is to be adopted as will operate most strongly against the party pleading it. It might be a matter of great importance to the *defendant that

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(1) See the pleadings set out, 77 R. R. 618 (3 Ex. 233).

(2) Before Patteson, J., Coleridge, J., Wightman, J., Cresswell, J., Erle,

J., Williams, J.: Talfourd, J., was present, but did not join in the judgment of the Court, he having been engaged as counsel in the case.

the plaintiff's son should have the superintendence of the work which would preclude the plaintiff from complaining of the way in which it had been executed.

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v.
CANNOCK.

(CRESSWELL, J.: There is nothing in the covenant which gives the parties who are to superintend the work, authority to say how it is to be done.)

Peacock, contra :

The declaration is good, and the judgment of the COURT below ought to be affirmed. According to the legal effect of the covenant, the superintendence of either party is not made a condition precedent or concurrent. They are to be at liberty to superintend the work whilst it is going on, at any time; but no time is fixed when they are to be present. It is a mere permission, which either party may avail himself of if he thinks fit.

Atherton replied.

PATTESON, J.:

We are all of opinion that the clause in question is neither a condition precedent nor concurrent. The covenant is an absolute one, that the defendant shall do the work within the period of eighteen months; and the succeeding clause was, as it appears to us, inserted for the benefit of both parties, which they were at liberty to avail themselves of if they should think fit to do so. The language of the covenant is no doubt obscure; but as we think that the words do not import a condition, the declaration, as it now stands, is good, and the judgment of the COURT below must be affirmed.

Judgment affirmed.

[The judgment of the Exchequer Chamber was, on the 5th of June, 1852, affirmed in the House of Lords (3 H. L. C. 700); no one appearing for the plaintiff in error. In moving the House, the LORD CHANCELLOR (LORD ST. LEONARDS) said]: *My Lords, the plaintiff in error does not appear at your Lordship's Bar to support the case which she has brought before you. The only question, therefore, for the House is this, whether your Lordships will, according to the modern precedents, affirm the judgment of the COURT below, or, according to a more ancient one, simply dismiss the appeal. It is for that reason that I have heard the short opening of the case, not with a view of forming any absolute decision upon it, but for the purpose of informing my own mind, and communicating

1852.

[*3 H. L. C.
700]

plaintiff in error, there is any case in point of law. I am of opinion that there is not. I shall therefore move your Lordships, not simply to dismiss the appeal, but to affirm the judgment of the Court below.

IN THE COURT OF EXCHEQUER.

BRANDFORD *v.* FREEMAN (1).

(5 Ex. 734—737; S. C. 20 L. J. Ex. 36; 14 Jur. 987.)

1850.

Nov. 7.

[734]

An incorrect ruling at *Nisi Prius*, as to the proper party to begin, is no ground for a new trial, unless it also appears that substantial injustice has resulted from it.

ASSUMPSIT. The first and second counts were by the plaintiff, as accommodation acceptor of two bills of exchange for 200*l.* each, against the defendant, for whose use the plaintiff had accepted them, for not indemnifying him. The last count was a count in 400*l.* for money paid by the plaintiff for the defendant's use. The defendant pleaded, that the sum of 400*l.* in the last count constituted one and the same debt as the two sums of 200*l.* mentioned in the first and second counts; and that the defendant entered into a composition deed with the plaintiff and his other creditors, whereby they covenanted not to sue him for any debts then due to them; and that the plaintiff, after the payment of the bills of exchange by him, had executed the said deed. Verification. Replication, that the said deed was executed by the plaintiff before the said bills were paid by him, and not afterwards; concluding to the country. Issue thereon.

At the trial of the cause, before Alderson, B., at the last Norfolk Assizes, the plaintiff's counsel insisted that the issue lay upon the defendant, and that therefore he was bound to begin, and to prove the issue. The learned Judge was of that opinion, and ruled accordingly; whereupon the defendant's counsel called a witness, who proved that the deed was executed after the first bill of exchange had become due and payable, but at that time the other bill had not arrived at maturity. The plaintiff accordingly obtained a verdict for the sum of 200*l.*

Couch now moved for a new trial, on the ground that the

(1) Cited in *Duke of Beaufort v. Crawshay* (1866) L. R. 1 C. P. 699, 710, 35 L. J. C. P. 342.—J. G. P.

*learned Judge was wrong in ruling that the defendant was bound to begin. The plaintiff ought to have begun, as the *onus* of proof lay upon him. The time when the bills were paid by him was a fact peculiarly within his own knowledge, and he was bound to show, in the first instance, that the money was paid.

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(PARKE, B.: It was held by this Court, in the case of *Edwards v. Matthews* (1), in the year 1847, that the mere fact that the wrong party has begun is no ground for a new trial; but that, in order to obtain the interposition of the Court, it must appear that some injustice has resulted.)

In the more recent case of *Doe d. Bather v. Brayne* (2), the Court of Common Pleas do not appear to have acted upon that rule. That was an action of ejectment by a devisee, and the defendant at the trial offered to admit the due execution of the will under which the plaintiff claimed the property, and that the plaintiff thereby would establish a *prima facie* case; but that he, the defendant, in support of his case, relied upon a will made by the testator at a subsequent period; and the learned Judge by whom the cause was tried ruled that the defendant, upon such an admission, was entitled to begin; but the Court held this ruling to be incorrect, and granted a new trial.

(POLLOCK, C. B.: The Court might very properly think in that case that justice was not fully effected, as the right to begin might be a matter of the greatest importance.)

The *onus* here was thrown upon the wrong party, which is a sufficient ground for this application.

(ALDERSON, B.: When I ruled that the defendant was bound to begin, ought not his counsel to have stood upon his right, by refusing to give any evidence? and then, if I had put the wrong question to the jury, or had told them that, in the absence of any evidence, the plaintiff was entitled to the verdict, and I had been wrong in so ruling, the defendant might have obtained a new trial on the ground of misdirection; but, instead of adopting such a course, the defendant's counsel called evidence, which failed to establish his case.)

POLLOCK, C. B.:

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I adhere to the decision of this Court in *Edwards v. Matthews*, in

(1) 11 Jur. 398.

(2) 5 C. B. 655.

which case time was taken for the purpose of deliberation before judgment was given. I observe that I there said, in delivering the judgment of the Court, "It appears that the rule adopted in this Court is this,—that the plaintiff or defendant having been called on to begin, when proof of the issue lay on his adversary, is not a sufficient ground for a new trial, unless it is manifest that the course of justice has been thereby interfered with, and some substantial injury effected at the trial of the cause." And I then added, that at one time I had an impression "that a miscarriage as to who should begin was so important a matter, and might, in many instances, interfere so much with the course of justice, that we ought always to interfere and correct it; but, on referring to the judgment of the Court in the cases to which I have alluded, we must now take it as settled, that the question, whether any injury has been done by the erroneous ruling of the Judge at Nisi Prius, is involved in the question of the propriety of granting a new trial for it. In the present case there has been no injury done. The trial was an issue directed for the purpose of informing the conscience of the Court, and on looking at all the evidence, we think that the verdict was right, and consequently ought not to be disturbed." So, in the present case, I think no injury has been done, as it is clear from the testimony of the defendant's witness, that the result must have been the same, however the Judge had ruled on the point.

PARKE, B. :

[*737] I am of the same opinion. This Court has settled, that when there has been a mere error with respect to the order of beginning, as deduced from the pleadings, no new trial ought to be granted; but that it is otherwise if the error has led to substantial injustice. One of the first cases on this subject was *Huckman v. Fernie* (1), where *Lord ABINGER, C. B., is reported to have said (2) : "I cannot say that we should interfere in a very doubtful case; but if the decision of the Judge were clearly and manifestly wrong, the Court would interfere to set it right." Now that is an inaccuracy, and I have corrected it in my own hand in the copy of Meeson & Welsby which is in this Court. What Lord ABINGER said was, that the order of beginning is a matter for the disposal of the Judge at Nisi Prius; but if his ruling "did clear and manifest wrong," the Court would interfere to set it right; and that view

(1) 49 B. R. 698 (3 M. & W. 505). (2) 49 B. R. 709 (3 M. & W. 517).

of his language is confirmed by the note appended to the report of *Edwards v. Matthews*, in the Jurist. By that rule I am prepared to abide, for it would be an extreme hardship to grant a new trial on such a ground alone, where substantial justice has been done between the parties. Admitting, therefore, for the sake of argument, that my brother ALDERSON was wrong in this case, in holding that the burthen of proof lay in the first instance on the defendant (which, however, I by no means admit, and indeed I think he was right, although I do not pronounce a positive opinion upon that point); still, upon the examination of the witness, it is perfectly clear what the result of the case would have been, had the ruling of my learned brother been that for which the defendant's counsel contended.

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ALDERSON, B. :

I agree with the other members of the Court in the rule which they have laid down, and still think that I was correct in holding at the trial, that the defendant was the party who was bound to begin.

Rule refused.

WILSON v. EDEN (1).

(5 Ex. 752—768; S. C. 20 L. J. Ex. 73.)

1850.
June 7.
Nov. 4.

[752]

A testator, by will made in 1815, after giving certain legacies, bequeathed "all the rest, residue, and remainder of his personal estate, goods, and chattels, whatsoever and wheresoever," subject to the payment of his debts and legacies, to D. "absolutely to and for his own use and benefit." The testator further devised "all and singular his manors, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, lying, arising, or being at or near Windlestone, in the county of Durham, and "all other his real estate" in the said county, "and all his estate and interest therein, to trustees, to the use of D. for life, and, after his decease, to the use of the first and other sons of D. in tail male." D. died in the lifetime of the testator, who, in 1841, made a codicil, whereby he appointed another executor, and ratified, confirmed, and re-published his will. The testator, at the time of his death, was possessed of both freehold and leasehold estates in the county of Durham: Held, that the will, having been re-published by the codicil, must, according to the provisions of the 34th section of the Wills Act, 1837 (1 Vict. c. 26), be deemed to have been made at that date; and, therefore, by virtue of the 26th section, the leaseholds passed to the trustees under the general devise of the real estate, no contrary intention appearing on the face of the will.

By order of the MASTER OF THE ROLLS (2) the following case was stated for the opinion of this Court :

- (1) See *Butler v. Butler* (1884) 28 Ch. D. 66, 54 L. J. Ch. 197.—J. G. P. 14 Beav. 317, 18 Q. B. 474, and 16
(2) See *Wilson v. Eden*, 11 Beav. 237, Beav. 153.—J. G. P.

county of Durham, Bart., duly made and published his will, dated the 14th of April, A.D. 1815; and after directing the payment of all his debts, funeral and testamentary expenses, and after giving certain annuities (with the payment of which he charged his real estates), and after giving certain legacies, he thereby gave and bequeathed as follows: "I give and bequeath all the rest, residue, and remainder of my personal estate, goods, and chattels, whatsoever and wheresoever, after and subject to the payment of my just debts, funeral and testamentary expenses, and the said legacies and bequests (except the said annuities) hereinbefore by me given as aforesaid, and all my estate and interest therein, unto my brother, Morton John Davison, Esq., late Morton John Eden, absolutely, to and for his own use and benefit." And the said testator gave and devised as follows: "I give and devise all and singular my manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, lying, arising, and being at or near Windlestone, West Auckland, St. Helen's Auckland, and Bishop's Auckland, in the county of Durham or in the city of Durham, and Brignal, in the county of York, and a parcel of land purchased by me of the late Mrs. Mary Lambton, at Romanby, *near North Allerton, in the North Riding of the county of York, and all other my real estates in the said counties of Durham and York, and elsewhere in Great Britain, and all my estate and interest therein, unto Robert Eden Duncombe Shafto, of Whitworth, in the county of Durham, Esq., William Nesfield, of Brancepeth, in the county of Durham, clerk, and Thomas Hopper, of the city of Durham, Esq., and their heirs, subject to the said annuities so given and devised as aforesaid; To hold the same unto the said R. E. D. Shafto, W. Nesfield, and T. Hopper, and their heirs, subject as aforesaid, to and for the several uses, upon the trusts, and to and for the intents and purposes, and under and subject to the powers, provisoes, declarations, and limitations hereinafter limited, declared, or expressed of and concerning the same; that is to say, to the use of my said brother, the said Morton John Davison, and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and from and immediately after the determination of that estate by forfeiture or otherwise in his lifetime, then to the use of the said Robert Eden Duncombe Shafto, William Nesfield, and Thomas Hopper, and their heirs, during the life of the said Morton

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John Davison, upon trust to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions, as occasion shall require; but nevertheless to permit and suffer the said Morton John Davison and his assigns, during his life, to receive and take the rents, issues, and profits of the said hereditaments and premises, to and for his or their own use and benefit: and, from and immediately after his decease, to the use of the first son of the said Morton John Davison, lawfully begotten, and of the heirs male of the body of such first son lawfully issuing; and for default of such issue, to the use of the second, third, fourth, and all and every other the *son and sons of the said Morton John Davison, lawfully to be begotten, severally, successively, and in remainder, one after another, as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body, being always to be preferred and take before the younger of such sons, and the heirs male of his and their body or bodies; and in the default of such issue, to the use of Sir William Eden, Bart., his heirs and assigns for ever." And the said testator thereby constituted and appointed the said Morton John Davison executor of his said will.

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The testator afterwards signed and published a testamentary paper, bearing date the 9th of March, 1835, purporting to be a codicil to his said will, and containing certain additions to and alterations of the annuities bequeathed by his said will, but not in any other manner affecting such will.

Morton John Davison, the brother of the testator, and the sole executor named in the will, died on the 28th of June, 1841, in the lifetime of the testator, and without ever having had any issue; and after his death, the testator duly signed and published another codicil to his said will, in the words and figures following: "This is a codicil to the last will and testament of me, Sir Robert Johnson Eden, of Windlestone, in the county of Durham, Bart., which will is dated the 14th day of April, 1815. Whereas, by my said will, I appointed as the executor thereof my late only brother Morton John Davison, Esq., who died on the 28th day of June last: Now I do, by this codicil, appoint my nephew, John Methold, Esq., the sole executor of my said will. And I hereby ratify, confirm, and re-publish my said will." As witness my hand this 10th day of July, 1841.—

John Methold afterwards took the name of Eden, instead of Methold. The testator died on the 3rd of September, 1844, without having revoked or altered his said will, except so far as the same was altered by the said codicils thereto, and without having revoked or altered the said codicils, or either of them. And the said will and codicils have since been duly proved by the said John Eden, the executor thereof. The testator was, at the time of his death, possessed of several leasehold estates in the townships of Merrington and Middlestone, both in the parish of Merrington, in the county of Durham, held under various leases from the Dean and Chapter of Durham, for terms of twenty-one years respectively, a part of which leasehold estates was acquired by the testator's father in the year 1772, and the remaining portions thereof had been acquired by his father, or himself, at various times since (1). And the Dean and Chapter of Durham have hitherto renewed the leases under which the said estates were held at the end of every seven years (according to their usual custom with respect to property held under leases from them), but the leases contain no covenant on their part to do so.

In the year 1833 the Dean and Chapter of Durham demised the coal mines under the said leasehold estates, and other adjoining lands, with power to erect cottages and make a railway; and several cottages have accordingly been erected, and a railway made through part of *the said leasehold estates. The testator was not at the time of his death possessed of or entitled to any leasehold estates for years, except in the townships of Merrington and Middlestone.

The township of Middlestone was heretofore in the parish of St. Andrew Auckland, but was on the 26th of April, 1845, annexed to the said parish of Merrington.

The parish of Merrington is intersected by a high ridge of hills, ranging east and west, upon the summit of which the church and

(1) At the suggestion of the COURT, the case was amended by inserting the following—"And the dates of the different purchases are as follows, (that is to say) Sir John Eden purchased,

A. R. P.			
57	2	31	in the year 1772.
60	0	9	" 1776.
47	1	27	" 1780.
158	2	16	" 1788.

A. R. P.

121	3	35	in the year 1801.
35	1	9	" 1803.
25	0	35	" 1808.

And the said testator, before the date of his will, purchased 17A. 3R. 5P. in the year 1813, and after the date of his will purchased 77A. 2R. 23P. in the year 1843."

village of Merrington are situated; and the greater portion of the said leasehold estates (to the extent of 589 acres, 38 perches, or thereabouts) lie to the south of the said ridge, and extend to and for about 2,050 yards, abut on the northern boundary of the freehold manor and estate of the testator in the township of Windlestone, heretofore in the parish of St. Andrew Auckland, but now forming part of the new parish of Counden, which was made a parish in the year 1842, and adjoin the said freehold estate of Windlestone, but are in part separated therefrom by a turnpike road, and in part by the ordinary hedges of the country, through which are necessary communications for those tenants who hold both freehold and leasehold in the same farm, and in some instances the leaseholds were let and occupied with the said freeholds at undivided yearly rents.

The said leasehold estates are not intermixed with or surrounded by the freehold lands of the said testator at Windlestone, but, with the exception of one plot, containing about 18 acres, they lie together, and a part of them are about a quarter of a mile from the mansion of Windlestone, but the turnpike road between Bishop's Auckland and Rushyford lies between them and the said mansion. The remainder of the said leasehold estates, containing about 72A. 1R. 12P., lie on the northern side of the aforesaid ridge, and about two miles from the testator's freehold mansion and estate at Windlestone.

The testator was, at the respective dates of making his will and of his death, seised of or entitled to, not only the said freehold manor and estate of Windlestone (which comprises the whole township of Windlestone, and contains 1,182A. 2R. 29P.), but also two freehold closes of land immediately adjoining the said Windlestone estate, and situated in the township of Counden, and containing together about 16 acres, and the freehold tithes thereof; and also some detached portions of freehold lands in the said township of Merrington, and containing together about 106 acres; and the freehold tithes of parts of the said leasehold estate in Merrington and of Middlestone; an estate in the township of West Auckland, chiefly freehold and copyhold, with the freehold tithes thereof; and two leases for lives, containing together 1,162 acres or thereabouts; and freehold lands in the township of Saint Helen's Auckland, containing 381 acres or thereabouts; two freehold fields, containing together about 19 acres, in the township of Bondgate, in Auckland; and the freehold messuage in the city of Durham: but which said

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The said freehold mansion and estate of Windlestone have been in the possession and the residence of the family of the said testator for upwards of one hundred years; and there are several cottages (some of which are ornamental) and other buildings standing upon that part of the said leasehold estates which is nearest the said mansion; and which buildings, consisting of three cottages called Well Houses, were, in the lifetime of the testator, occupied by persons employed about the said mansion and estate at Windlestone; and the testator, during his lifetime, expended upwards of 40,000*l.* in rebuilding or restoring the said mansion and premises.

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On the 20th of February, 1845, Eleanor Wilson, one of the sisters and next of kin of the testator, filed her bill in *the Court of Chancery against John Eden, the executor of the testator, and Sir W. Eden and others, praying (amongst other things) that it might be declared that the testator died intestate as to his leasehold estates, and that an account might be taken of the rents and profits, &c.

The question for the opinion of the Court is, whether the leasehold estates, of which the testator, Sir Robert Johnson Eden, died possessed, passed under the devise in his will of all and singular his manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, lying, and arising, or being at or near Windlestone, West Auckland, St. Helen's Auckland, and Bishop's Auckland, in the county of Durham or in the city of Durham, and Brignall in the county of York, and all other his real estates in the said counties of York and Durham, and elsewhere in Great Britain, and all his estate and interest therein (1).

(1) It was agreed that the will should form part of the case; but the only other portions of it material to the present question are the following:

“ Provided always, and I do hereby declare my will and mind to be, that it shall and may be lawful for the said Morton John Davison, when and as he shall, by virtue of the limitations aforesaid, be in the actual possession of, or entitled to, the rents, issues, and profits of the said hereditaments and premises, by any deed or deeds,

&c., to grant, limit, or appoint to or to the use of any woman or women whom he may marry, either before or after any such marriage, for the life of any such woman, for her jointure, and in bar or without being in bar of her dower, any annual sum or yearly rent-charge, not exceeding the annual sum of one thousand pounds, &c., to be issuing out of and charged and chargeable upon all or any part or parts of the said hereditaments and premises hereinbefore devised, with

Humphry (Elmsley with him) argued for the plaintiff in last Trinity Term (June 7):

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The leaseholds did not pass under the general devise of the real estate. The will commences with a marked distinction between the real and personal estate. The real estate is charged with the payment of debts and testamentary expenses, and it is devised to trustees and their heirs, for the use of a tenant for life without impeachment of waste, and after the determination of that estate to trustees, to preserve contingent remainders,—provisions inapplicable to leaseholds. First, as to the law prior to the Wills Act, 1 Vict. c. 20. The rule laid down in *Rose v. Bartlett* (1) is this, "That if a man hath lands in fee and lands for years, and deviseth all his lands and tenements, the fee simple lands pass only, and not the lease for years; and if a man hath a lease for years and no fee simple, and deviseth all his lands and tenements, the lease for years passeth, for otherwise the will should be merely void." That rule was recognised and commented on by Lord ELDON, Ch. J., in his elaborate judgment in *Thompson v. Lady Lawley* (2), where he says, that it "is a rule which has been acknowledged for ages." Also, in *Watkins v. Lea* (3), Lord ELDON, Ch. J., refers to that rule with approbation. Numerous cases in which the rule has been acted on are collected in Jarman on Wills, vol. 1, p. 616; and Roper on Legacies, vol. 2, p. 1488, 4th ed. The word "farm," which is not used here, is of large extent: *Shep. Touch. chap. 5, p. 98; yet where the devise was of "all that freehold farm called the Wick Farm, containing 200 acres or thereabouts, occupied by E. as tenant to me," to uses applicable to freehold property only, and E.

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the usual powers and remedies of distress, entry, &c.; and also to limit and appoint the hereditaments which shall be so charged as aforesaid, to any person or persons, for any term or terms of years, upon such trusts, for better securing the payment of any such yearly rent-charge, as to the said M. J. Davison shall seem meet," &c. "Provided always, and I do hereby declare my will and mind to be, that it shall and may be lawful to and for the said M. J. Davison during his life, and, after his decease, for the person or persons who shall, for the time being, under or by virtue of the limitations aforesaid, be in the actual possession of or well entitled to

the hereditaments and premises aforesaid, or the rents, issues, and profits thereof, from time to time, to demise and lease all or any part or parts of the said hereditaments and premises, with the appurtenances, to any person or persons, for any term or number of years not exceeding twenty-one years in possession, and not in reversion or by any way of future interest, so as there be reserved and made payable on every such lease, during the continuance thereof, the best and most improved yearly rent or rents," &c.

(1) Cro. Car. 292.

(2) 5 R. R. 595 (2 Bos. & P. 303).

(3) 6 Ves. 633.

the lease as Wick Farm, or which twelve acres were leasehold, it was held that the twelve acres did not pass by the devise : *Hall v. Fisher* (1). [He cited *Arkell v. Fletcher* (2), *Stone v. Greening* (3), *Parker v. Marchant* (4), *Addis v. Clement* (5), *Day v. Trigg* (6), *Doe d. Dunning v. Cranstoun* (7), *Goodman v. Edwards* (8), and *Hobson v. Blackburn* (9).]

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Secondly, the case is not governed by the 26th section of the 1 Vict. c. 26. The question depends on the effect *of the republication of the will, how far, if at all, it brings the case within that enactment; and it is submitted, that the statute was never intended to apply to cases where all the real estate is in terms devised to one person, and the personal estate to another, but only where there is a general devise in terms large enough to import any tenure. Besides, in this case, there is no devise of the land of the testator "in any place," but only "at or near" Windlestone. Assuming, however, that the statute does apply, still the general devise will not include the leaseholds, because a contrary intention appears by the will. Here is an express gift of all the residue of the personal estate to the testator's brother, which is inconsistent with a gift of the leaseholds to the trustees. The words "all other my real estates" mean "freehold" estates. The powers of jointuring and leasing are also inconsistent with an intention that the trustees should take the leaseholds. *Cole v. Scott* (10) decided, that it is not necessary that such contrary intention should be expressed in so many words, or in some way quite free from doubt; but it is to be gathered by adopting, in reference to the expression used by the testator, the ordinary rules of construction applicable to wills.

Malins for the defendant :

First, as to the effect of the limitation prior to the 1 Vict. c. 26. Though, as a general rule, a devise of "land" would pass only real estate, yet the exceptions were, if the circumstances showed an intention on the part of the testator that the leaseholds should pass, or if he had no freehold land to satisfy the bequest. Here an intention to pass the leaseholds may reasonably be presumed. In

(1) 66 R. R. 14 (1 Coll. 47).

(2) 51 R. R. 254 (10 Sim. 299).

(3) 60 R. R. 364 (13 Sim. 390).

(4) 2 Y. & C. C. C. 279.

(5) 2 P. Wms. 456.

(6) 1 P. Wms. 286.

(7) 56 R. R. 597 (7 M. & W. 1).

(8) 39 R. R. 348 (2 My. & K. 759).

(9) 36 R. R. 381 (1 My. & K. 571).

(10) 1 Mac. & G. 518.

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the first place, the leaseholds had been from time to time renewed, so that the testator, no doubt, considered them as a durable property, and in the nature *of real estate. Besides, from the year 1772, there had been an uninterrupted unity of enjoyment of some of the leaseholds with some of the freeholds at entire rents, without distinguishing what was paid for the leasehold, and what for the freehold. And further, the leaseholds almost entirely bordered on the family mansion and grounds, and part of them extended up to within a quarter of a mile of the mansion, and some cottages had been erected thereon by the testator for the use of persons employed about the mansion. Those circumstances take this case out of the general rule laid down in *Rose v. Bartlett* (1). There is a distinction between permanently renewable leaseholds and a mere lease for a definite term of years, as was the case in *Thompson v. Lady Lawley* (2). That distinction is adverted to in *Addis v. Clement* (3), where it was held, that the words "possessed of or any ways interested in," included renewable leaseholds. This case resembles that of *Lane v. Earl Stanhope* (4), where the lease contained no covenant for renewal on the part of the lessor, but the Court referred to extrinsic circumstances as showing the intention of the testator, and held that the leasehold estate passed under a devise of "all my manors, messuages, houses, farms, lands," &c. Also, in *Hobson v. Blackburn* (5), where the limitation was to uses strictly applicable to freehold property only, the Court looked to the intention of the testator, to be collected from the circumstance of the leasehold property being blended in enjoyment with the freehold.

(ALDERSON, B. : In that case, there was no other access to the leasehold part than by its communication with the freehold.)

In *Goodman v. Edwards* (6), the devise was of land, containing by estimation 100 acres, forty of which were held under a renewable lease; but they were nevertheless held to pass, as the circumstances showed *that the testator meant to comprise them under the description of real estate.

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Secondly, the case falls within the 1 Vict. c. 26. The 34th section of that Act expressly declares, "that every will re-executed,

(1) Cro. Car. 292.

(2) 5 B. R. 595 (2 Bos. & P. 303).

(3) 2 P. Wms. 456.

(4) 3 B. R. 197 (6 T. R. 345).

(5) 36 B. R. 381 (1 My. & K. 571).

(6) 39 B. R. 348 (2 My. & K. 759).

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or republished, or revived by any codicil, shall, for the purposes of this Act, be deemed to have been made at the time it was so re-executed, republished, or revived." The effect of the republication of the will by the codicil was the same as if the testator had, at the date of the codicil, made a will in the words of the will so republished: *Doe d. York v. Walker* (1), *Winter v. Winter* (2). Then, by the 26th section, a general devise of land shall include copyhold and leasehold, unless a contrary intention shall appear by the will. That statute has abrogated the rule laid down in *Rose v. Bartlett*, which so frequently frustrated the intention of testators. The effect of the enactment is to introduce the words "copyhold" and "leasehold" into a general devise of land, so that it must now be read, "all and singular my freehold, copyhold, and leasehold lands." The word "land" now means everything immoveable, unless a contrary intention appears. If the devise had been of "all my freehold and copyhold lands," the mention of the two descriptions would have shown an intention to exclude the third. Or if the testator had said, "I give all my leasehold estate in the county of York," that would have shown an intention to exclude his leaseholds elsewhere. Here, however, the word "freehold" is not used, but the devise is in general terms. Even before the 1 Vict. c. 26, leaseholds for lives would pass *under a devise of "all other my real estate:" *Fitzroy v. Howard* (3), *Weigall v. Brome* (4).

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Humphry replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.:

This case, which was sent for our opinion by the MASTER OF THE ROLLS, arises out of the will of Sir Robert Johnson Eden, who died on the 3rd of September, 1844; and the question is, whether certain leasehold estates, of which he was possessed at his decease, passed under the general devise of his real estates. The will was made in 1815, and its material parts are as follows (his Lordship stated them): Morton John Davison died in June, 1841, and thereupon the testator made a codicil, duly executed and attested, in the following words (his Lordship read the codicil). The facts, as to

(1) 67 R. R. 427 (12 M. & W. 591).

(3) 27 R. R. 73 (3 Russ. 225).

(2) 71 R. R. 122 (5 Hare, 306).

(4) 38 R. R. 89 (6 Sim. 99).

the leaseholds in question, are these (his Lordship stated them). The case states as a fact, that the testator, at the date of his will and of his death, was seised of other real estates in the county of Durham, besides his mansion, &c. at Windlestone.

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In this state of things, it was contended before us, on behalf of the plaintiff, that the leaseholds did not pass under the general devise of the real estates. And in support of this view of the case, *Mr. Humphry* relied on the case of *Rose v. Bartlett*, in which the general principle was laid down, recognised and followed by very many authorities up to *Thompson v. Lawley*, where Lord ELDON went through the whole of the cases, and fully recognised the general doctrine. On the other hand, *Mr. Malins*, for the defendants, contended, that there are in this case circumstances which distinguish it from *Rose v. Bartlett* and the other cases in which leaseholds have been held not to pass. In the first place, here the leaseholds, by *usage, though not by express contract, have always been renewed from time to time, so as to give them, practically, the permanence of estates held in fee simple. Secondly, some of the leaseholds have been let and occupied with some of the freeholds at undivided yearly rents, not distinguishing what was the rent of the freehold and what of the leasehold; and, thirdly, the leaseholds almost entirely bordered on the family mansion and grounds, and some part of them extended up to within a quarter of a mile of the mansion; and some cottages were erected thereon by the testator, for the use of persons employed about the mansion.

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These, and similar circumstances are pointed out by Lord ELDON in the case we have referred to, as circumstances which might prevent the operation of the general rule. But even if they would not do so in the present instance, still, it was contended, that here the late statute, 1 Vict. c. 26, s. 26, is decisive, and puts an end to all question on the subject. (His Lordship read the section (1).)

Now, we are of opinion that this section clearly governs the present case, and so that it is unnecessary for us to speculate as to

(1) Which enacts "That a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate

which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will."

having been re-published by the codicil in 1841, must, according to the express provisions of section 34, be deemed to have been made at that date; and it is, therefore, to be treated as a will made after the 31st of December, 1837.

[*767] That being so, let us consider how the case would have stood prior to the Act, if the testator had had no lands whatever except these leaseholds. It is clear that, in such a case, the leaseholds would have passed, in order that some effect might be given to the will. This, indeed, is a branch of the general rule enunciated in *Rose v. Bartlett*, and cannot be disputed. This being so, the 26th section of the statute states positively, that the general *devise shall be construed to include the leaseholds, unless a contrary intention appears by the will.

Mr. Humphry argued, that such contrary intention does appear here, because there is an express gift of all the residue of the personal estate to the testator's brother, which, he contended, was inconsistent with a gift of the leaseholds, which are part of the personal estate, to the trustees for the purpose of the settlement. But this is a fallacy. If, before the statute, a testator, having leaseholds but no freeholds in Durham, had given all his lands in Durham to A. B., and all his personal estates to C. D., there can be no doubt but that A. B. would have taken the leaseholds. The circumstances, in such a case, show that, under the words personal estate, the testator did not mean to include his leaseholds; and if such would have been the construction before the statute, in a case where the testator had only leaseholds so now the same construction is, by the express words of the statute, to prevail, even though the testator had freeholds as well as leaseholds. The gift of "all my personal estate," clearly means only all my personal estate not otherwise disposed of, and when the statute has made the general devise a valid disposition of the leaseholds, it follows that these are not included in the general description of all my personal estates, or all the residue of my personal estate.

The only other circumstances relied on by *Mr. Humphry*, as showing an intention to exclude the leaseholds, were the powers of jointuring and leasing. But we attribute no weight to this part of his argument. The powers would be available in equity, so as to affect the renewed leases from time to time, and the case finds as a fact that such renewals were always regularly made.

It remains only to notice one other argument of *Mr. Humphry's*, namely, that he had no necessity to resort to the words at the end of the clause, "unless a contrary intention appears on the face" of the will, for that here the *case was not brought within the enacting part of the section; he contended, that there is not here any devise of the land of the testator in any place, so as to come within the language of the statute. But in this *Mr. Humphry* is certainly wrong. The words of the will are, "I give and devise (*inter alia*) all my lands near Windlestone, &c., and all my other real estates in Great Britain, and all my estate and interest therein, unto &c. &c." Surely a devise of "my lands near Windlestone" is a devise of the testator's lands in some place; and certainly the words amount to a general devise, which, before the statute, would have included leaseholds, if there had been no freeholds to which the description would apply.

We think it clear, therefore, first, that the enacting words of the 26th section apply to this case; and, secondly, that no contrary intention appears on the face of the will, so as to prevent the operation of the enactment. This being our view of the effect of the statute, it is unnecessary to consider how the case would have stood independently of the statute; but we must say, there are very strong grounds for contending that the facts of this case might have led to the same result as that which we have arrived at, even if the statute had not passed.

We shall certify our opinion to the MASTER OF THE ROLLS in conformity with the opinion we have expressed.

Certificate accordingly.

BRADLEY v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

(5 Ex. 769—774; S. C. 20 L. J. Ex. 3; 1 L. M. & P. 597.)

A Railway Company having refused compensation for injury done to the premises of B., he, on the 5th of December, served them with a notice under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), requiring them to appoint an arbitrator on their behalf, and stating that it was his intention to appoint M. as his arbitrator; and that if, for the space of fourteen days after that notice, the Company failed to appoint an arbitrator on their behalf, he would appoint M. to act for both parties. The Company having refused to refer the matter to arbitration, B., on the 1st of January following, served them with a notice, which, after reciting that he had appointed M. as his arbitrator, stated that he then appointed M. to act as arbitrator on behalf of both parties. The arbitrator having awarded a certain sum to be paid to B., the COURT refused to enforce or

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set aside the award on motion, intimating their opinion that there was no valid appointment of the arbitrator.

Scmble; that, under the 8 & 9 Vict. c. 18, s. 25, an appointment by the claimant of an arbitrator to act for both parties is not valid, unless he has previously appointed an arbitrator on his behalf, and notified such appointment to the Company.

In this case a rule had been obtained by the London and North Western Railway Company, calling on one Bradley to show cause why a rule of the 7th of May should not be discharged, and why the award of one S. D. Martin, contained in the said rule, should not be set aside, upon the ground that the arbitrator had awarded respecting several matters over which he had no jurisdiction. A cross rule had been also obtained, calling on the London and North Western Railway Company to show cause why they should not pay to T. Bradley the sums of 900*l.* and 239*l.* 9*s.* pursuant to a rule of the 7th of May, and to the award of one S. D. Martin.

It appeared from the affidavits, that the Huddersfield and Manchester Railway and Canal Company (incorporated by the 11 Vict. c. cliv. with the London and North Western Railway Company), by the exercise of the powers and authorities conferred by their Acts, constructed a tunnel under the town of Huddersfield, and so near to the premises of Thomas Bradley as to cause considerable damage thereto. In October, 1849, Bradley claimed compensation from the Company, but they refused to recognise his claim. On the 5th of December he sent to the Company a notice, which, after specifying the injury sustained by him, stated that he claimed compensation in pursuance of the statute in such case made and provided, *to the amount of 1,250*l.* The notice then proceeded thus :

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“ And further take notice, that unless you, the said Company, are willing to pay to me the said sum of 1,250*l.*, and shall enter into a written agreement for that purpose within twenty-one days after the receipt by you of this notice, then it is my desire that the amount of compensation to be paid to me by you, by reason of the premises, shall be settled by arbitration, according to the provisions of the Act or Acts of Parliament in that case made and provided. And if you the said Company fail to *pay me the said sum of 1,250*l.*, or to enter into such written agreement as aforesaid within the said twenty-one days, then and in that case I do hereby request and require you, the said Company, to nominate and appoint an arbitrator to act on your behalf in the matter of the said arbitration. And further take notice, that it is my intention to nominate and appoint Samuel Dickinson Martin, of Leeds, in the county of

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York, surveyor and engineer, as my arbitrator in and concerning the matters aforesaid; and that if for the space of fourteen days after the service of this notice and request, you, the said Company, shall fail to nominate and appoint an arbitrator to act in your behalf as aforesaid, I, the said Thomas Bradley, will appoint the said S. D. Martin to act on behalf of both parties. Witness my hand this 5th day of December, 1849.

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“THOMAS BRADLEY,
“of Huddersfield, in the county of York.”

The Railway Company having, on the 26th of December, refused to refer the matter to arbitration, Bradley served the Company with a written document, dated the 1st of January, 1850, which, after reciting the notice of the 5th of December, concluded in these terms :

“And whereas a space of more than fourteen days and more than twenty-one days have long since elapsed after the said dispute as aforesaid had arisen, and after the said notice and request in writing had been made and served upon the said Company; and the said Company have for the space of more than fourteen days and more than twenty-one days after the said dispute had arisen, and after the service of the said notice and request upon the said Company as aforesaid, failed and refused to appoint any arbitrator in the said matters in dispute. And whereas I, the said *Thomas Bradley, did by the said notice and request in writing appoint the said Samuel Dickenson Martin my arbitrator in the matters in dispute as aforesaid. Now I, the said Thomas Bradley, in pursuance of the statute in such case made and provided, appoint the said Samuel Dickenson Martin to act as arbitrator on behalf of both parties in the said matters in dispute. Dated the 1st of January, A.D. 1850..

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“THOMAS BRADLEY.”

The arbitrator accordingly made appointments for proceeding with the reference, which was attended on the 23rd and 24th of January by Bradley and his attorney, and by the attorney on behalf of the Company under protest, who submitted to the arbitrator that the damages claimed were not recoverable under the Lands Clauses Consolidation Act, and that the present mode of proceeding was not the right mode of recovering damages. The Company also delivered a written notice to Bradley, to the effect, amongst other things, that his notices were informal and invalid; and that the

ineffectual. On the 26th of March, the arbitrator in his award, which recited the previous proceedings including the two notices, awarded to Bradley the sum of 900*l.* as compensation, and 289*l.* 9*s.* as costs.

Hoggins and *Hugh Hill* showed cause on behalf of the claimant Bradley against the former rule, and appeared in support of the latter :

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It is objected, that the claimant did not make a valid appointment of an arbitrator within the 25th section of the 8 & 9 Vict. c. 18, inasmuch as his notice merely stated his intention to appoint Martin as arbitrator. To that there are two answers: first, the document of the 1st of January, 1850, after reciting the notice, states that Bradley did, in pursuance of the statute, appoint *Martin as his arbitrator; and if the fact were not so, it should have been denied by affidavit. Secondly, the Railway Company having, for the space of fourteen days, failed to appoint an arbitrator, Bradley was empowered by the statute to appoint one to act on behalf of both parties, and that he has done by the document of the 1st of January, 1850.

(ALDERSON, B. : It seems that there must be two appointments.

PARKE, B. : The claimant should appoint an arbitrator on his behalf; and then, after notification of such appointment, and request in writing, if the other party fails for the space of fourteen days to appoint an arbitrator on his behalf, the claimant may appoint one to act for both. The ground for requiring an actual appointment of an arbitrator by the claimant is, that the other party may consider whether he will acquiesce in that appointment. Here, there has been no notice of any appointment, but only of an intention to appoint.

POLLOCK, C. B. : Bradley was not bound by the notice to appoint Martin as his arbitrator; he might, after sending it, have altered his intention, and appointed some one else; and how could the Company be certain that he would not? There must be an appointment from which the claimant cannot recede, so that, if the other party were contented with the person named, that party might be sure of his services.)

The section does not in terms require that notice of the appointment of an arbitrator by the claimant should be given to the other side; and as other conditions precedent are mentioned, the rule, *expressio unius est exclusio alterius*, applies. The appointment of an arbitrator to act for the claimant, and afterwards for both parties, may be made by the same instrument.

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(PARKE, B.: If the Company had consented under seal to the appointment, perhaps it might have been good within the previous part of the section; but here the question is, whether the claimant can appoint an arbitrator to *act for both parties, unless he has previously appointed one on his own behalf.)

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At all events, there is sufficient doubt as to the meaning of the section to warrant the Court in discharging the rule; and the validity of the award may be contested in an action, and the point decided by a court of error.

Watson (Cleasby with him) in support of the rule:

This is a proceeding *in invitum*, and everything must appear on the face of the document to show jurisdiction: *Rex v. The Trustees of the Norwich and Watton Road* (1). Now the notice to the Company only states an intention to appoint an arbitrator, not an actual appointment; and the instrument of the 1st of January, 1850, states the appointment by way of recital only.

POLLOCK, C. B.:

We are all of opinion that both rules ought to be discharged, but without costs.

Rules discharged, without costs.

MILLWARD v. LITTLEWOOD.

(5 Ex. 775—778; S. C. 20 L. J. Ex. 2.)

1850.
Nov. 6.

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A declaration alleged, that, in consideration that the plaintiff, at the defendant's request, promised to marry him, he promised the plaintiff to marry her. Averments: that the plaintiff hath continued and still is unmarried, and, until the discovery of the defendant's marriage, was ready and willing to marry him; that, after the defendant's promise, the plaintiff discovered that the defendant, at the time of his promise, was, and still is, married, and that the plaintiff had not, at the time of the defendant's promise, any notice of the defendant's then marriage: Held, on motion in

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arrest of judgment, that the declaration was good ; and that the plaintiff's remaining unmarried was a sufficient consideration to support the defendant's promise.

Quære, whether a promise by a married man to marry another woman after his wife's death, is void.

ASSUMPSIT. The declaration stated, that, on &c., in consideration that the plaintiff, being sole and unmarried, had, at the defendant's request, promised the defendant to marry him, the defendant promised the plaintiff to marry her. Averment, that the plaintiff hath always, from the time of the making of the defendant's promise, for a reasonable time, to wit, until &c., continued and still is unmarried, and was, from the time of the defendant's promise until the discovery hereinafter mentioned, ready and willing to marry the defendant. That, after the making of the defendant's promise, and before the commencement of this suit, to wit, on &c., the plaintiff discovered that the defendant was then married, to wit, to one Hannah Littlewood ; and that the defendant, at the time of making his promise, and from thence hitherto, hath been and still is married ; and that the plaintiff had not, at the time of the defendant's then promise, any notice of the defendant's then marriage.

Pleas, first, *Non assumpsit* ; secondly, that the plaintiff had notice of the defendant's marriage.

At the trial, before Parke, B., at the last Chester Summer Assizes, the jury found a verdict for the plaintiff, damages 200*l*.

Herbert Jones, Serjt., now moved to arrest the judgment :

[*776] It is conceded, that this case is similar to *Wild v. Harris* (1), where the declaration alleged, that, in consideration that the plaintiff, being unmarried, had promised the defendant to marry him within a reasonable time, the defendant promised *the plaintiff to marry her within a reasonable time ; that the plaintiff remained unmarried, and had always, until she had notice that the defendant was married, been ready and willing to marry him ; that, although a reasonable time had elapsed, the defendant had not married the plaintiff, but, on the contrary, the defendant, at the time of his promise, was and still is married to another woman ; and on the motion in arrest of judgment, the Court of Common Pleas held, that the declaration disclosed a sufficient consideration for the defendant's promise ; at the same time observing, that it was not absolutely impossible of performance, for

(1) 78 B. R. 899 (7 C. B. 999).

the defendant's wife might have died within a reasonable time. The only difference between that case and the present is, that there the promise alleged was to marry within a reasonable time, here it is to marry generally. It is submitted, however, that the case of *Wild v. Harris* cannot be supported. A contract of this kind is *contra bonos mores*, and against public policy. The language of Lord MANSFIELD, in *Holman v. Johnson* (1), with reference to immoral and illegal contracts, applies here. Besides, at the time of the promise, the defendant could not perform it, and, therefore, the promise is void. The Court of Common Pleas founded their judgment on the authority of Brooke's Abridgment, tit. "Conditions," fol. 152 b, pl. 119 (2). That, however, professes to be an abridgment of the case in 40 Ass. 13 (3), where the reporter *adds, "*quære de isto judicio*, for it seems that the condition was void, because the feoffee had a wife at the time."

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[*777]

(PARKE, B., in Fitz. Nat. Brev. p. 205, H., it is said, "A woman enfeoffed a man upon condition that he should take her to wife, and he had a wife at the time of the feoffment, and afterwards, the woman, for not performing the condition, entered again into the land upon the second feoffee, and her entry was adjudged lawful, and the condition good:" Anno 40 Edw. III. Lib. Ass.)

POLLOCK, C. B. :

There ought to be no rule. The case of *Wild v. Harris* does not in substance differ from this. Therefore, as there

(1) Cowp. 343.

(2) "Ass. feñ fuit ssI, et infesse hōe q̄ auoit feñ sur cōdiç q̄ il luy marriera, le fessée infesse A., que infesse B., q̄ infesse C., que infesse D., le priñ fessée deuie, le feñ enī sur D. xvi ās āps, et lenī bōe, car ceo est admit bō cōdiç, car cōnt q̄ le fessée ne puit marry al temps del fessēm̄t, dnō poet estī q̄ sa feñ deuiera, et dōqs il puit aū marry le fesseres, et ideo bon cōdiç, et lenī congeable."

(3) "Un assise fuit port envers ū feme: qui pl' nul tort, et le verdict vient et dit, coment la feme fuit de m̄ la terī en sa demeñ come de fee, et de m̄ la terre enfeoffa ū J. sur cōdition, q̄ luy duist prēdī a

feme, le q̄l J. av' une feme a ceo temps, le q̄l J. enfeoffa oust' ū aut, et il oustī; et issint plusours feoffēm̄ts tanq̄ le pl' ore fuit enfeoffe: et trove fuit, q̄ celuy qui primes fuit enfeoffe p' la conditiō, fuit mort, et q̄ les feoff. fueī continus issint p' xvi ans, et q̄ la feme entra sur cēy q̄ est ore pl'. Et sur ceo ils fueī adjornī a W. ou p' avise de tous les Justiç fuit ag', q̄ le pl' ne prist riē p' son bñe, eo q̄ la tñe fuit tous temps charg' ove la conditiō; issint l'enī congeable pur la conditiō enfrent, ē q̄ mains la tñe fuit. *Quære de isto Judicio*: car come semble la cōdiç fuit void, eo q̄ le feoffée av' feme a ceo temps, *ut supra*. *Ideo quære.*"

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is the judgment of a court of co-ordinate jurisdiction upon the express point, I feel myself bound by it, and must leave the parties to question that decision in a court of error. I own, however, that I am disposed to differ from the authorities which have been referred to. I think it is inconsistent with that affection which ought to subsist between married persons, that a man should, while his wife is alive, promise to marry another woman after his wife's death. Nothing but the judgment of the highest tribunal will compel me to think, that, by the law of the land, such a promise is good.

ALDERSON, B. :

It is unnecessary to decide whether a promise by a man to marry a woman after his wife's death is good, because here it is found as a fact that the plaintiff had no knowledge that the defendant was married. In my opinion the difficulty arises in respect of the promise alleged being a promise to marry within an indefinite
[*778] *time. What was decided by the recent case in the Court of Common Pleas, I think, was rightly decided.

PARKE, B. :

I entirely concur in what was said by the Court of Common Pleas in *Wild v. Harris*. The promise by the defendant to marry the plaintiff implies, on his part, that he is then capable of marrying, and he has broken that promise at the time of making it. The consideration to support the promise is, that the plaintiff, at the request of the defendant, engaged to marry him within a reasonable time, and therefore she remained unmarried; and that is a sufficient consideration to bind the defendant. It is unnecessary to express any opinion, whether a promise by a married man to marry a woman after his wife's death, is valid or not. The passage in Fitzherbert's Abridgment tends to show that it is a good promise. Here, however, it is enough to say, that there is a sufficient consideration for the defendant's promise, namely, that the plaintiff remained unmarried; and if she discovered, on the day after the defendant's promise, that he was a married man, I should nevertheless say that the consideration would be sufficient.

Rule refused.

TAYLOR v. BULLEN.

(5 Ex. 779—787; S. C. 20 L. J. Ex. 21.)

1850.
Nov. 13.

[779]

The defendant, being the owner of a ship, advertised its sale, describing it as "The fine teak-built barque *Intrepid*, A. 1, and well adapted for a passenger ship." The plaintiff, having read the advertisement, negotiated for its purchase, and a contract was signed by the plaintiff and defendant, whereby the former agreed to buy and the latter to sell the "barque *Intrepid*, as she now lies in the St. Katherine Dock, agreeable to the inventory annexed." The inventory commenced by describing the ship in the same terms as the advertisement: under that was the word "Inventory," which was followed by a list of the ship's stores and tackle; and in the margin, opposite to this list, the defendant signed his name. The document concluded thus: "The vessel and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, weight, quantity, quality, or any defect or error whatever." The vessel proved not to be teak-built, nor of class A 1, nor adapted for a passenger ship: Held, first, that the whole of the above document was incorporated with the contract of sale, and not merely the list of stores headed "Inventory." Secondly, that there was no warranty of the vessel.

CASE. The first count of the declaration stated, that the plaintiff, at the request of the defendant, bargained and agreed with the defendant to buy of him a certain ship or vessel of the defendant called the *Intrepid*, together with certain stores, chattels, and appurtenances thereto belonging, at and for a certain price, to wit, 2,200*l.*; and the defendant then, during such bargaining and agreeing, falsely, fraudulently, and deceitfully warranted the said ship to be teak-built, and together with the said appurtenances to be of the description or quality known as A 1, and to be well adapted for a passenger ship, and thereby then induced the plaintiff to agree for and buy, and accordingly by the means aforesaid then agreed to sell and sold the same, together with the said stores, chattels, and appurtenances, to the plaintiff; whereas, in truth and in fact, the said ship, at the time of the warranty, agreement, and sale, was not teak-built, and was not, together with the said appurtenances, of the description or quality known as A 1, and was not adapted for a passenger ship. Averment, that, by means of the premises, the defendant had falsely and fraudulently deceived him the plaintiff on the said agreement for and sale of the said ship, and thereby the said ship is of much less value to the plaintiff, &c. (alleging special damage).

Third plea. That the defendant did not warrant *modo et formâ*: concluding to the country. Issue thereon.

This action came on to be tried at the sittings in London after last Michaelmas Term, 1849, when, by consent *of the parties, a

[*780

tion, subject to the opinion of the Court, whether the facts herein-after stated entitled the plaintiff to maintain such verdict upon the third issue. If so, the said verdict is to stand, subject to the decision of an arbitrator upon another issue joined between the parties; but, if not, the said verdict is to be set aside, and a verdict on the third issue entered for the defendant. The issues arising out of the second count were by consent found for the defendant.

In June, 1848, the defendant, being the sole owner of the barque *Intrepid*, caused the following advertisement to be inserted in the *Shipping Gazette*: "The fine teak-built barque, *Intrepid*, A 1, 286½ tons register, built under particular inspection at Coringa in the year 1842, of the best materials, shifts without ballast, carries a good cargo, has a poop and excellent height between decks, and is well adapted for a passenger ship. Length 91 5-10ths feet, breadth 22 feet 8 inches, depth 16 feet 8 inches. Now lying in the St. Katherine Docks. For inventories and further particulars, apply to J. H. Arnold, 8, Clement's Lane, Lombard Street."

The plaintiff, having read such advertisement and seen the said ship, negotiated, by F. J. Mercer, his agent, for the purchase of the said vessel; and on the 11th of July, 1848, the following contract was signed by Mercer and the defendant:

"F. J. Mercer agrees to buy, and Captain Bullen agrees to sell, the barque *Intrepid*, as she now lies in the St. Katherine Dock, agreeable to the Inventory annexed, for the sum of 2,200*l*." (It then provided for the mode of payment.)

"Cash on deposit, 100*l*."

"F. J. MERCER,

"Witness, DAVID NUTT."

"ROBERT BULLEN."

[*781] The paper mentioned in the said contract as the "Inventory *annexed," was a partly written and partly printed paper, of which a copy accompanies this case, and is to be taken as part thereof. It was signed and annexed by the defendant to the said contract at the time when the letter was signed by him. The paper was as follows:

"FOR SALE, BY PRIVATE CONTRACT,

The fine Teak-built Barque

Intrepid, A 1, 286½ TONS REGISTER.

Built under particular inspection at Coringa in the year 1842, of the best materials; shifts without ballast, carries a good cargo,

has a poop and excellent height between decks, and is well adapted for a passenger ship. Length, 91 $\frac{5}{10}$ ft.; breadth, 22 ft. 8 inches; depth, 16 ft. 8 inches.

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NOW LYING IN THE ST. KATHARINE DOCKS.

Hull, Masts, Yards, Standing and Running Rigging, with all faults as they now lie.

INVENTORY.

(Signed) ROBERT BULLEN.	ANCHORS.	BOATSWAIN'S STORES.	SHIP CHANDLER'S STORES.	COOK & CABIN STORES.
	1 Best Bower.			
	1 Small ditto. &c.	1 $\frac{1}{2}$ Coils new rope. &c., &c.	5 Brass Compasses. 1 Barometer (1). &c., &c.	1 Hearth. &c., &c.
	CABLES.			PROVISIONS.
	1 Bower. &c., &c.	GUNNER'S STORES.	COOPER'S STORES.	&c., &c.
	SAILS.	13 Boarding pikes &c., &c.	4 Butts. &c., &c.	BOATS.
	1 Flying jib. &c., &c.			&c., &c.

The iron kentledge on board is not sold with the ship, being the property of the St. Katharine Dock Company.

The vessel and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, weight, quantity, quality, or any defect or error whatever.

For inventories and further particulars, apply to

J. H. ARNOLD,

8, Clement's Lane, Lombard Street, London."

The signature of the defendant in the margin thereof was in the place there indicated.

On the 27th of July a bill of sale of the said ship was duly executed.

The plaintiff's point for argument was, that the documents set out and referred to in the case constituted a warranty of the ship, in the terms of the first count of the declaration. The contrary was maintained by the defendant.

[782]

Cowling, for the plaintiff:

The plaintiff is entitled to retain the verdict. The ship was sold "agreeable to the inventory annexed," which means the whole document, including the advertisement, and not merely that part

(1) This was in writing.

(POLLOCK, C. B.: The defendant merely describes the vessel as teak-built, and states that she is to be taken with all her faults, but that he will not warrant her.)

It is submitted, that the true meaning of the document is, that the vessel is to be taken with all faults consistent with her being a teak-built ship.

(PARKE, B.: Suppose the defendant had wished to relieve himself from all responsibility, what other words could he have used, unless he had said in express terms "I will not warrant?")

Shepherd v. Kain (1) is an authority in point. [He also cited *Kain v. Old* (2), *Freeman v. Baker* (3), and *Pickering v. Dowson* (4).]

[783]

Barstow, for the defendant:

Looking at the case apart from authority, the very terms of the contract exclude any warranty. The agreement refers only to that part of the printed paper which is described as an "inventory," and which mentions the list of stores. The defendant signs the paper for the purpose of identifying it as the inventory referred to in the contract of sale, not for the purpose of adopting the whole; and his signature is against that part which is described as an inventory. The words "one barometer" being written, not printed, a signature was necessary as a guarantee of its correctness. Further, the authorities support the defendant's view. *The case is not distinguishable from *Freeman v. Baker*. In *Shepherd v. Kain* the words were without allowance for any "defects." Here the defendant has expressly guarded against any warranty, by inserting the word "errors."

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Cowling replied.

POLLOCK, C. B.:

The defendant is entitled to judgment. The action is for a breach of warranty, and the question is, whether, under the circumstances, the defendant gave any warranty at all. The present case is distinguishable, in some of its features, from every other case to which

(1) 24 B. R. 344 (5 B. & Ald. 240).

(2) 26 B. R. 497 (2 B. & C. 627).

(3) 39 B. R. 651 (5 B. & Ad. 797).

(4) 4 Taunt. 779.

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our attention has been drawn in the course of the argument. Assuming that the whole of the paper in which the inventory is comprised, is to be attached to the contract, it is expressly stated, that "the vessel and her stores are to be taken with all faults, as they now lie, without any allowance for deficiency in length, weight, quantity, quality, or any defect or error whatever." *Mr. Cowling* relied chiefly on the case of *Shepherd v. Kain*, an authority which I have no desire to impeach. Substantially, it was there held, that if a ship is sold as a copper-fastened vessel, "to be taken with all faults," that means with all such faults as being a copper-fastened vessel it may have; and that if it be not a copper-fastened vessel, the warranty is broken. Here the vessel is "to be taken with all faults," "without any allowance for any defect or error whatever." Now, when the defendant distinctly says, that he will warrant nothing, but describes the vessel as teak-built, that description is either fraud or error. If fraud, the plaintiff has another remedy; if error, all liability in respect of it is excluded by the terms of the contract. The real meaning of the contract is this: "There is a vessel now lying in St. Katherine's Docks, I describe her as being the *Intrepid*, A 1, and call her a teak-built barque; but I expressly give you notice that I do not mean to warrant anything; I point out what I mean, go and look at the inventory of stores, examine and judge for yourself, but understand, that you *must take her with all her faults, and without allowance for any defect or error whatever." That is a distinct declaration, that the defendant will warrant nothing; and we therefore give effect to the spirit of the contract, by holding this no warranty.

[785]

PARKE, B. :

I am of the same opinion. The question is, whether the averment in the first count of the declaration, that the defendant warranted the ship to be teak-built, A 1, and adapted for a passenger ship, was proved. The proof given was, that the defendant subscribed an agreement and inventory attached, by which he agreed "to sell the bark *Intrepid* as she now lies in the St. Katherine's Dock, agreeable to the inventory annexed." The points for our consideration are, whether the inventory is embodied in the contract; and, if so, whether there is any warranty. *Mr. Barstow* insisted, that the case did not differ from *Freeman v. Baker*, and that the defendant's intention was merely to incorporate in the contract of sale the description of the ship's stores in the inventory.

to import into the contract something which would answer the description in the inventory as well of the vessel as of the list of stores, for, the inventory being attached to the agreement, the defendant has signed the inventory. It was argued, that that is explained by the insertion of the words "one barometer" in writing. I cannot, however, help thinking, though on the whole I have some doubt, that the parties meant to contract that the vessel should be sold according to the terms of the inventory. The question then turns on the effect of the memorandum, viz. "The vessel and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, weight, quantity, quality, or any defect or error whatever." If the language had been solely "any defect whatever," *Shepherd v. Kain* is an authority, that it must be construed with reference to defects which it *may have consistently with its being the thing described. But then we find the word "error," which has been introduced for further protection; and I cannot put any construction upon that word, except that of "unintentional misdescription." According to the contract, it must be a "barque" that is sold; but if there is any involuntary misdescription of such a vessel, that is covered by the word "error." The term "error," when used with reference to the purchase of real estate, has been construed to mean a misstatement or misdescription erroneously and not wilfully introduced: *The Duke of Norfolk v. Worthy* (1), *Wright v. Wilson* (2). So, in this case, I construe the word "error" to mean any "unintentional misdescription." It seems to me therefore, though I had some doubt in the course of the argument, that, looking at the particular language of the inventory, this is a misdescription of the vessel which comes within the term "error," and consequently that there is no warranty.

ALDERSON, B. :

I am of the same opinion. The contract of sale has reference to the paper annexed to it, and the whole of the latter is to be treated as one paper, and as part of the bargain. The contract is in effect this, "I agree to sell you the bark *Intrepid* as she now lies in St. Katherine's Dock, agreeably to an inventory which I have annexed, and which contains a description of the barque, as well as a description of her stores." According to the best English

(1) 10 R. R. 739 (1 Camp. 340).

(2) 1 Moo. & Rob. 207.

writers, the word "inventory" includes a description of a person as well as of those parts of his dress or other matters which are particularly specified. Thus Shakespeare speaks of a lady being inventoried: "I will give out divers schedules of my beauty: it shall be inventoried, and every particle and utensil labelled to my will" (1). Then treating the description of the vessel as part of the inventory, there is attached to the *whole document a stipulation that there shall be no allowance for any defect or error. What is this but an error in the description. The vessel is described as teak-built, and it turns out that she is not teak-built. I agree with the authority of *Shepherd v. Kain*. That case only decided that the sale of a vessel as a copper-fastened vessel to be taken with all faults, meant with all faults consistent with her being a copper-fastened vessel, and that consequently the vendee was not bound to accept a vessel not copper-fastened. This case is totally different, for here there is an express provision, that the vendor shall not be responsible for any error whatever.

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[*787]

Judgment for the defendant.

SKINNER *v.* THE LONDON, BRIGHTON, AND
SOUTH COAST RAILWAY COMPANY (2).

(5 Ex. 787—792; S. C. 15 Jur. 299.)

1850.
Nov. 8.

[787]

A declaration against a Railway Company stated, that the plaintiff, at the request of the defendants, became a passenger in one of their trains, to be carried from &c., for reward to them, &c.; that, through the carelessness, negligence, and improper conduct of the defendants, the train in which the plaintiff was such passenger, struck against another train, whereby the plaintiff was injured. At the trial, it appeared, that the train in question had been hired of the Company by a benefit society for an excursion, the tickets for which were sold and distributed by the treasurer of the society, from whom the plaintiff purchased one; and that the accident was occasioned by the train in which the plaintiff was, running against a train standing at the station, it being then dark: Held, first, that the mere fact of the accident having occurred was *prima facie* evidence of negligence on the part of the defendants. Secondly, that there was evidence for the jury that the plaintiff was a passenger to be carried by the defendants.

CASE. The declaration stated, that the plaintiff, at the request of the defendants, became and was a passenger in one of their carriages, being one of a train of carriages of the defendants drawn by a locomotive engine of the defendants, to be by them safely and securely carried and conveyed from Brighton to London, for reasonable reward to the defendants in that behalf; and the

- (1) "Twelfth Night," Act 1, Scene 5. Co. (1867) L. R. 2 Q. B. 412, 427 (affd).
(2) Cited, *Readhead v. Midland Rail.* L. R. 14 Q. B. 379).

1850.
Nov. 8.

THE ATTORNEY-GENERAL v. ROBSON.

(5 Ex. 790—792; S. C. 20 L. J. Ex. 188.)

[790]

The owner of a vessel, who knowingly lets it for the purpose of fetching goods to be landed without payment of duty, is, if the goods are so landed, liable to penalties under the 8 & 9 Vict. c. 87, s. 46 (1), as a person "concerned" in the illegal unshipping of goods.

[*791]

THIS was an information under the 8 & 9 Vict. c. 87, s. 46 (2), charging the defendant with being concerned in *the illegal unshipping of tobacco, the duties for which had not been paid.

At the trial, before Pollock, C. B., at the Middlesex sittings after last Trinity Term, it appeared that the defendant was the owner of a vessel, which he had let on a voyage from Newcastle to Scheveling, well knowing that the object of the voyage was to fetch tobacco, and run the same at Yarmouth. In order to carry out the scheme, the defendant had cleared the vessel in question at Newcastle, as for a voyage with coals to Yarmouth; but the captain sailed direct to Scheveling under the guidance of a pilot sent on board by the charterers with the knowledge of the defendant. The defendant was at Yarmouth when the vessel arrived there from Scheveling with the cargo of tobacco, and, after it had been run, complimented the captain on the clever way in which he had managed the matter. The defendant received 200*l.* for the use of the vessel. Upon these facts it was submitted on the part of the defendant, that he was Not guilty of the offence charged; but the learned Judge ruled

(1) Repealed by S. L. R. Act, 1875. See now 39 & 40 Vict. c. 36, s. 186. "Every person who shall import or bring or be concerned in importing or bringing into the United Kingdom" any prohibited goods, &c., "or shall unship or assist or be otherwise concerned in the unshipping of any goods which are prohibited," &c.—J. G. P.

(2) That section enacted: "That every person who shall, either in the United Kingdom or the Isle of Man, unship, or assist, or be otherwise concerned in the unshipping of any goods which are prohibited to be imported into the United Kingdom or into the Isle of Man, or the duties for which have not been paid or secured, or who shall knowingly harbour, keep, or conceal, or shall knowingly permit or suffer to be harboured, kept, or concealed, any goods which shall have

been illegally unshipped without payment of duties, or which shall have been illegally removed without payment of the same from any warehouse or place of security in which they may have been deposited, or any goods prohibited to be imported, or to be used or consumed in the United Kingdom or in the Isle of Man; and every person, either in the United Kingdom or in the Isle of Man, to whose hands and possession any such prohibited or uncustomed goods shall knowingly come, or who shall assist or be in anywise concerned in the illegal removal of any goods from any warehouse or place of security, in which they shall have been deposited as aforesaid, shall forfeit either the treble value thereof, or the penalty of 100*l.*, at the election of the Commissioners of her Majesty's Customs."

otherwise, and a verdict was found for the Crown, with 8,000*l.* penalties.

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v.
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Bramwell now moved for a new trial on the ground of misdirection :

The defendant was not concerned in the unshipping of the tobacco, though the purpose for which the vessel was hired might have been known to him. A person who merely affords to others the means of doing a particular act cannot be said to do it himself. The defendant took no part in the running of the tobacco, and in fact his interest in the transaction ceased, when the vessel arrived at Yarmouth.

(POLLOCK, C. B. : Suppose an *indictment for conspiracy, could it have been said that he was not an associate in the transaction? The words "otherwise concerned" mean having any interest whatever in the matter.

[*792]

ALDERSON, B. : Perhaps it might not be said that the defendant "assisted," but he was certainly "concerned" in the unshipping.)

Per CURIAM :

There will be no rule (1).

Rule refused.

MILNER v. FIELD.

(5 EX. 829—830; S. C. 20 L. J. EX. 68.)

1850.
Nov. 11, 25.

[829]

Where a building agreement between the plaintiff and defendant contained a proviso, that no instalment should be paid unless the plaintiff delivered to the defendant a certificate, signed by the surveyor of the defendant, that the works were performed according to the specification : Held, that the want of a certificate was a good defence under the general issue to an action for the instalments ; and that the plaintiff was not at liberty to prove that it was withheld by collusion with the defendant.

ASSUMPSIT for goods sold and delivered, work and labour, and materials, &c. Pleas: *Non assumpsit*, payment, and set-off. Issues thereon.

At the trial, before Pollock, C. B., at the last Surrey Assizes, it appeared that the plaintiff sought to recover for work done under a written agreement, whereby the plaintiff agreed to build for the defendant thirty houses, for the sum of 3,130*l.*, to be paid by instalments as the works progressed. There were penalties for

(1) POLLOCK, C. B., ALDERSON, B., and PLATT, B.

MILNER
v.
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the non-performance of the works at certain stipulated periods; and also a proviso, that none of the instalments should be payable, unless the plaintiff should deliver to the defendant a certificate, signed by the surveyor for the time being of the defendant, that the works had been in all respects well and substantially performed, according to the specifications and plans. Some of the instalments had been paid, and the action was brought to recover the balance. No certificate was obtained; but the plaintiff's counsel tendered evidence to show that the defendant had appointed his own father as his surveyor, and that although the works were in all respects properly done, the certificate was withheld fraudulently and by collusion with the defendant. It was objected, on the part of the defendant, that this evidence was inadmissible; and the learned Judge, being of that opinion, nonsuited the plaintiff, reserving leave for the plaintiff to take the opinion of the Court upon the point; and if they should think the evidence admissible, the cause was to be referred.

[*830]

Lush in the present Term (November 11) moved accordingly, and submitted, that the want of a certificate could not be taken advantage of under the general issue; *but that the proviso should have been pleaded specially; or, at all events, the plaintiff ought to have been allowed to give evidence of fraud.

Cur. adv. vult.

POLLOCK, C. B., now said:

In this case there will be no rule. Where, by the contract itself, the certificate of a surveyor is made a condition precedent to the right to payment, even if it be withheld by fraud, that is only the subject of a cross action. The nonsuit, therefore, was right.

Rule refused.

1850.
Nov. 15, 16.

[830]

TIELENS v. HOOPER.

(5 Ex. 830—834; S. C. 20 L. J. Ex. 78.)

By indenture, the plaintiff granted to the defendant, for a term of years, the exclusive licence to use a patent, upon payment of certain sums by way of royalty. The indenture contained a covenant for payment of the royalty, and also the following: "And it is hereby agreed, that if it shall happen in any year during the continuance of the term that royalties or sums of money hereinbefore covenanted to be paid shall not amount to the sum of 2,000*l.* sterling, then and in every such case, and as often as the same shall so happen, the defendant shall, within fourteen days after the expiration of any year in which it shall so happen, pay to the plaintiff such a sum of

money as with the royalty hereby reserved will amount to 2,000*l.* for that year; or if the defendant shall, at any time, make default in payment of such sum of money aforesaid, within the time appointed for payment, then it shall be lawful for the plaintiff, by writing signed by him, and indorsed on the said indenture or duplicate thereof, to declare that the said indenture, and the powers and licence thereby granted, shall cease and determine: Held, that this was not an absolute covenant, on the part of the defendant, to pay 2,000*l.* a-year during the term, but an alternative covenant, enabling the plaintiff to put an end to the licence on non-payment of that sum by the defendant.

TIELENS
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COVENANT. The declaration stated, that, by an indenture made between the plaintiff and defendant, the plaintiff granted to the defendant, for a term of years, the exclusive licence to use a patent for improvements in a machine, upon payment to the plaintiff of certain sums by way of royalty during the said term. It then set out the following clause: "And it is hereby agreed, that if it shall happen in any year during the continuance of the said term, that the royalty or royalties, or sum or sums of money hereinbefore covenanted to be paid as aforesaid, shall not amount to the sum of 2,000*l.* sterling, then and in every such case, and as often as the same shall so happen, the *defendant shall, within fourteen days after the expiration of any year in which it shall so happen, pay to the plaintiff, or the person or persons entitled to the patent, such a sum of money as, with the royalty or royalties hereby reserved and covenanted and agreed to be paid as aforesaid, will amount to and make up the whole and clear sum of 2,000*l.* for that year; or, if the defendant shall at any time make default in payment of such sum of money aforesaid within the time appointed for payment, then it shall be lawful to and for the plaintiff, or the person or persons for the time being entitled to the patent, by any writing signed by them or him, and indorsed on the said indenture or duplicate thereof, to declare that the said indenture, and the power and licence thereby granted, shall cease and determine." Breach, that, although the sums by way of royalty amounted to less than 2,000*l.* a-year, the defendant had not, within fourteen days after the expiration of the year, paid to the plaintiff such a sum as with the royalty made up the full sum of 2,000*l.* a-year.

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The defendant demurred generally, after setting out on *oyer* the indenture, which, in addition to the above covenant, contained a covenant on the part of the defendant to pay the royalty. Joinder in demurrer.

Hugh Hill argued in support of the demurrer (Nov. 15):

This is not an absolute covenant to pay 2,000*l.* a-year during the

the defendant has the option of paying the 2,000*l.* a year, or, if he do not, the plaintiff may determine the licence. The covenant must be construed according to the plain meaning of the words and the intention of the parties. "It is hereby agreed," may be words either of condition or of covenant. Some effect must be given to the word "or," and there is no reason why it should not be read in its ordinary grammatical sense.

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Montague Smith, contra :

This is a grant of the exclusive licence to use the patent for the whole of the term, and it is reasonable that the licensor should have a rent certain in return for it. The stipulation cannot be construed as a condition, without rejecting the words "and it is hereby agreed," which import a distinct and independent covenant. In Bacon's Abr., Covenant (A), it is said, "The law does not seem to have appropriated any set form of words, which are absolutely necessary to be made use of in creating a covenant; and therefore it seems that any words will be effectual for that purpose, which show the party's concurrence to the performance of a future act: as, if lessee for years covenants to repair, &c., provided always, and it is hereby agreed, that the lessor shall find great timber, &c. this makes a covenant on the part of the lessor to find great timber by the word 'agreed;' and it shall not be a qualification of the covenant of the lessee." This is not an alternative covenant, because no option is given to the covenantor. There is an absolute obligation to pay the annual sum, and the word "or" may well be read "and." If an apprentice deed contained a stipulation, that the apprentice should well and faithfully serve, or the master might put an end to the apprenticeship, the latter might nevertheless sue for a breach of the covenant. The term "provided" may operate as a covenant: Shep. Touch. ch. 7, p. 162.

Hugh Hill, in reply, cited Co. Litt. 203 b, *Simpson v. Titterell* (1), *Hays v. Bickerstaffe* (2), *Warren v. Asters* (3).

Cur. adv. vult.

POLLOCK, C. B., now said :

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This was an action of covenant on an indenture, by which the plaintiff granted to *the defendant a licence to work a patent

(1) Cro. Eliz. 242.

(3) T. Jones, 205.

(2) 2 Mod. 35.

for improvements in a certain machine. The plaintiff by his declaration claimed 2,000*l.* per annum for a certain period, on the ground that the agreement between the parties was for a minimum rent. The indenture contained a stipulation, that the plaintiff should have a certain share of the benefit or royalty, as it was called; but it was contended, on the part of the plaintiff, that the meaning of the parties was, that there should be a minimum rent. The part of the indenture, upon which that question arises, is as follows: (His Lordship read the passage above set out.) The question submitted for the opinion of the Court is substantially this, whether the word "or" should be read "and," that is, whether there is a stipulation for a minimum rent, with an additional clause, that, if it be not paid, the licence may be put an end to, or whether this is to be read as an alternative covenant, viz. that if the party chooses to pay the licence will continue, or if he does not pay, that then the plaintiff shall have the power to put an end to it. We are of opinion, there being only these two alternatives, and the word "or" occurring in the way in which it does, that we are bound to give effect to the plain and grammatical meaning of these expressions. And for myself, I must say that I think that is by far the most reasonable conclusion to come to. In the case of a patent, the patentee may very well say, "If I grant you a licence, which in substance is an exclusive licence, reserving to myself a certain royalty or share, if I find that that does not amount to a certain sum, then you shall either make that sum up to me, or I shall have the power of putting an end to the licence." It merely means this: I think the invention is of great utility, it may be of great profit, and if it turns out that you, from a want either of spirit or industry in pressing it, or a want of attention to business, or for any other reason, do not make it available, so that my royalty is gone, then I claim to myself the power *of taking the invention from you, and carrying it to some other person who will probably make more use of it. For myself, I think it is far more reasonable to suppose that the parties came to that agreement, than that they came to a stipulation for a minimum rent of 2,000*l.* per annum, without being at all confident that the invention would produce 500*l.* In construing agreements, as well as in construing Acts of Parliament, the Court is bound to put on them that meaning which is the plain, clear, and obvious result of the language used. In the present case it happens, so far as my judgment goes, that the meaning which we affix to the words used

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by the parties, is also by far the most natural and probable agreement the parties would have made under the circumstances. Our judgment, therefore, will be for the defendant.

Judgment for the defendant.

1850.
Nov. 23.
[834]

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PANY, IN RE EMERY (1).

(5 Ex. 834—856; S. C. 20 L. J. Ex. 37; 14 Jur. 1028; 1 L. M. & P. 788.)

A *scire facias* may be obtained at the suit of a creditor against a shareholder in a Joint-stock Company, under the 36th section of the 8 Vict. c. 16 (the Companies Clauses Consolidation Act, 1845): *Quære*, whether that is the sole remedy.

Where a Company was established for the purpose of making a railway in Ireland, and the plaintiff had recovered judgment against the Company, and had issued a writ of *fi. fa.* into the county of Surrey, to which there was a return of *nulla bona*, and had issued a *testatum fi. fa.* into Middlesex, to which writ there was a like return, but he had not taken any means to levy execution in Ireland, the COURT made the rule absolute to issue a *scire facias* against a shareholder of the Company, who, as chairman and director of the Company, stated at a general meeting of the body, that the Company had no funds to meet the claims against the Company, one of those claims being the judgment debt of the plaintiff.

PEACOCK moved for a rule, calling on George Emery to show cause why a writ of *scire facias* should not issue against him, as a shareholder in the Kilkenny and Great Southern and Western Railway Company, under the provisions of the 36th section of the Companies Clauses Consolidation Act, 8 Vict. c. 16.

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It appeared from the affidavits, that the Company was incorporated by the 9 & 10 Vict. c. cccx., which embodied the Companies Clauses Consolidation Act, and the several Acts relating to railways. The plaintiff had sued the Company in the present action, to recover from them a certain amount, alleged to be due from them to him, as their local agent. On the 14th of July, 1849, a Judge's order was made by consent, to stay all further proceedings in the action on payment of a certain sum, and in default of such payment the plaintiff was to be at liberty to sign judgment and issue execution for the whole amount, with costs, &c. In July following, default was made, and final judgment was signed for the sum of 1,140*l.* 8*s.* 2*d.*, and a writ of *fi. fa.* was issued into the county of Surrey, to which there was a return of *nulla bona*; and to a

(1) See *Kernaghan v. Dublin Trunk Railway Co.* (1867) L. R. 3 Q. B. 47, 48, 37 L. J. Q. B. 50.—J. G. P.

testatum, which was thereupon issued into Middlesex, there was a like return. On the 23rd of January, 1850, an agreement was entered into between the plaintiff and the Company, that the former should receive payment of his debt by certain instalments; and that a copy of the register of shareholders in the Company should be supplied to him; and that, in case of default in payment of any one of the instalments, he should be at liberty to take proceedings against the shareholders. The first of these instalments alone was paid, *and the present application was made to obtain the balance still remaining due to the plaintiff. It appeared, that Mr. Emery was a shareholder in the Company, and was one of its first directors; and that he was the chairman at a half-yearly meeting of the Company, held on the 30th of August, 1850, when a report was read, stating, (*inter alia*) that, in consequence of calls not having been duly responded to, the directors were unable to free the Company from its pecuniary engagements; that two judgments had been obtained against the Company, one of which was the present, and the other was one at the suit of a person named Hitchings; and that, as the directors were unable to satisfy these demands, no alternative was left them but to allow the creditors to take such steps as they might be advised, to obtain the amount of these judgments. On moving the adoption of this report, it was stated by Mr. Emery himself, that if the shareholders had paid up the calls, they would have had ample funds in hand to meet all liabilities of the Company; but that, as it was, the Company had not sufficient funds in hand to provide for these judgments.

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Peacock in support of the motion :

It is submitted that the present form of application is the correct one. It has been very recently decided by the Court of Common Pleas, in *Hitchings v. Kilkenny, &c., Railway Company* (1), that the Court will not allow execution to issue against a shareholder in a case like the present, except by *scire facias*.

(PARKE, B.: The wording of this statute, and that of the Banking Act, 7 Geo. IV. c. 46, s. 13, is certainly not the same. Like the Banking Act, it provides that no execution shall issue against individual members of the Company, except upon an order of the Court "made upon motion in open Court, after sufficient notice in

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writing to the persons *sought to be charged." It does not, however, stop there, but contains the following further words, which are not to be found in the previous Act, viz. "and upon such motion such Court may order execution to issue accordingly." But then, on the other hand, it does not adopt the clear and decisive language of the Joint-Stock Companies Act, 7 & 8 Vict. c. 110, s. 68, which says, that execution may issue by leave of the Court, "without any suggestion or *scire facias* in that behalf." It is to be presumed that the Legislature knew what they had done the preceding year, and they did not say in this statute, that there shall be no necessity for a *scire facias*.)

It seems, from the recent decision in the Common Pleas, and from that of *Bartlett v. Pentland* (1), that a *scire facias* is the proper form of remedy.

The COURT having granted a rule *nisi*,

Slade showed cause in the first instance :

This rule ought to be discharged, unless the plaintiff succeeds in establishing four distinct matters to the satisfaction of the Court, so as to entitle himself to the benefit of the provisions of the 36th section. In the first place, he is bound to show that Mr. Emery is a shareholder in the Company ; secondly, he must show the amount of shares he has in the Company ; thirdly, the amount of calls unpaid on those shares ; and fourthly, that the Company have no sufficient property on which execution can be levied. All these matters ought to be expressly and distinctly shown upon the affidavits, and ought not to be left to be collected by mere inference. The case of *The Newry and Enniskillen Railway Company v. Edmunds* (2) shows with what strictness the Courts will construe these enactments. That was an action for calls on shares, and this Court held, that, in *order to prove a man a shareholder under this statute, his name must be on the sealed register ; and that, although it was upon the draft register, even with his consent, that was not sufficient, as he might have disposed of his shares before the register was made up. The second and third points may perhaps be put in issue by traverses to the *scire facias* ; but the fourth point is entirely a matter within the discretion of the Court, namely, whether the Company has any property whereon the plaintiff may, by the exercise of due diligence, obtain the

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(1) 1 B. & Ad. 704.

(2) 76 R. R. 520 (2 Ex. 118).

fruits of his judgment against the Company, for the return of *nulla bona* to the writ is a matter of no weight, as it may have been the mere act of the plaintiff's attorney. The Company may have sufficient property in Ireland to satisfy this demand, and the inference to be fairly drawn from the affidavits leads to such a conclusion. They may not indeed have funds in their hands, but they may have a large amount of landed property and stock in Ireland, which may be made available for the purpose of satisfying any debts to which the Company may be liable.

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(PARKE, B. : This subject has been under our consideration upon two occasions, with reference to the true construction of the Banking Act, 7 Geo. IV. c. 46 ; upon the first occasion we had the case of *Dodgson v. Scott* (1), which came before me. It was there sought to make a prior partner in a Bank liable on a judgment against the Bank ; and with respect to the fact of a person's being a partner, my opinion was, that there could be no doubt that that was a matter to be tried on plea to the *scire facias*, and that I might, therefore, be less scrupulous in the decision to which I should come ; and that the same would apply to the case of a person sought to be made liable as having been a partner at the time of the contract entered into. There, however, there was another question, on which I threw out the intimation that, whether due efforts had *been made to enforce the plaintiff's judgment against the parties primarily liable, i.e. the members of the Company for the time being, was a matter altogether for the determination of the Court, and could not be questioned by plea to the *scire facias*, and, therefore, that I must decide it to the best of my power on the materials brought before me, and I came to the conclusion that sufficient endeavours had been made in that case. Then there is a subsequent case of *The Bank of England v. Johnson* (2), before the full Court, where the question arose ; and we were of opinion, that a *scire facias* under that statute against a member of the Company, at the time of the contract entered into with the plaintiff, ought to state the prior execution against the members of the Company for the time being, and that it was ineffectual. Now, by parity of reasoning, would it be necessary here, under the present statute, to state in the *scire facias* a prior execution against the goods of the Company, and that there was not sufficient on which to levy ?)

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The defendant could not dispute such matters upon the *scire facias*,

(1) 76 R. R. 657 (2 Ex. 457).

(2) 77 R. R. 753 (3 Ex. 598).

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and the Court, therefore, ought to hesitate before it grants such a remedy against a shareholder.

Peacock, in support of the rule :

The object of this application is to make Mr. Emery a party on the record. This can be done only upon certain conditions, which are to be set forth on the writ. But these matters are traversable. Thus, where an executor applies for a *scire facias*, he must allege in the writ that he is executor, and that allegation is traversable. The allegation, that there is no property of the Company on which the plaintiff could levy execution, might be traversed, and would be like the issue raised on a return of the sheriff, that there were no goods of the defendant in his bailiwick on which he might have *levied.

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(ALDERSON, B. : Under particular circumstances the Court may allow a *scire facias* to issue ; but, in the present case, ought you not to have shown that you sued in Ireland, and had used your best endeavours to obtain your debt there ? The Company may be perfectly solvent in that country, and have a large amount of property.)

The presumption is the other way, for the affidavits are uncontradicted, which allege that, at a meeting of the Company, it was stated that they had not any funds by which they were enabled to satisfy the demand.

POLLOCK, C. B. :

I think that this rule ought to be made absolute. It is an application on the part of the plaintiff under the 8 Vict. c. 16, c. 36, which received the Royal assent in the month of May, 1845. By virtue of that section, the Court has power to award execution against any of the shareholders of a Company "to the extent of their shares respectively in the capital of the Company not then paid up ; provided always that no such execution shall issue against any shareholder, except upon an order of the Court in which the action, suit, or other proceeding shall have been brought or instituted." We are told that the Court of Common Pleas have very recently decided that execution in the usual form cannot be issued in cases like this, but that a *scire facias* is necessary. On the present occasion application is made for a *scire facias* only, and

not for execution in any other shape; and it therefore becomes altogether unnecessary to say anything about the decision to which reference has been made. On argument it might turn out that the decision is perfectly well founded, and for the reasons I am about to state. The power given to the Court by the language of the stat. 8 Vict. c. 16, is to order execution, and not to issue a *scire facias*. I am therefore anxious to state my reasons for thinking we may do so, though we might issue execution if we thought proper. *Inasmuch then as the execution spoken of in this section is to issue upon certain conditions, i.e. certain matters being the foundation for it, it is manifest that the Court must have the power to investigate the truth of those matters advanced as the foundation of the *scire facias*. It is like the case put by the plaintiff's counsel, of an executor who applies for a *scire facias*. He must allege that he is executor, and that allegation may be traversed. It appears to me, that inasmuch as the Court has the full power of investigating the truth of such matters, but that these matters, if questioned, may be submitted to the consideration of a jury, it is far better that the investigation should take place by means of a traverse of an allegation to a *scire facias*, rather than by an issue directed by the Court. Supposing, therefore, that the Court may issue execution, it may also issue a *scire facias*; and I state this with the view of excluding any inference that I either concur in or dissent from what is stated to be the opinion of the Court of Common Pleas. We are now not asked to issue execution, but a *scire facias*. I am clearly of opinion that the plaintiff is entitled to have the *scire facias*. As to the decision of the Court of Common Pleas, to which we have been referred, I think it is extremely possible that the Court did not decide that under no circumstances could they issue execution. If they can issue a *scire facias*, it is within their discretion to say which of the two they will issue; and on the present occasion, I am by no means satisfied that a *scire facias* would not be the course best adapted to attain the ends of justice. The question, whether execution might issue or not, certainly forms no part of our judgment; but it may be observed that, in the previous Act of the 7 & 8 Vict. c. 110, which was passed in September, 1844, it expressly enacts, in the 68th section, that the Court on motion or summons may direct execution "without any suggestion or *scire facias* *in that behalf." In the last statute nothing is said about suggestion or *scire facias*, and it may be, that the Legislature having once expressly enacted in distinct terms

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that the Court may by leave permit execution to be issued without suggestion or *scire facias*, and afterwards having used the language of the section before us, that if there cannot be found sufficient property of the Company whereon to levy execution, such execution may be levied against the shareholders by leave of the Court where the suit shall be pending; it may be, that the course of proceeding to which I have alluded having been once adopted in express terms, the Legislature considered it only necessary to use such terms as would lead by implication to the same conclusion. We need not, however, decide that point now; but I could not express my concurrence with the rest of the Court in granting this rule, without guarding against any prejudice to the opinion that execution might issue without the intervention of a *scire facias*.

PARKE, B. :

I am of the same opinion. The only question upon which we are called to express any opinion is, whether a *scire facias* ought to issue in the present case; and on the affidavits before us I think there is a sufficient case to call on us to issue one. In that *scire facias* I apprehend it will be necessary to state, according to the impression of this Court in *The Bank of England v. Johnson*, that which must come as preliminary matter, before the Court exercises its jurisdiction at all by issuing a *scire facias* against a person who has not paid his calls, that execution at law has issued against the property and effects of the Company, and that there has not been found sufficient whereon to levy such execution. That is a preliminary proceeding to give the Court jurisdiction to issue execution against an individual member of the Company. This Court will exercise its jurisdiction according to its view of the necessity for the remedy; and it must be satisfied *that due pains have been taken to obtain execution upon any property the Company may possess. A *prima facie* case must, therefore, be made out that there is nothing on which to levy, and upon that we are to exercise our judgment whether a *scire facias* ought to issue. And to exercise that discretion properly in this case, we are to inquire whether the plaintiff's debt could be levied on or satisfied from the Irish property of this Company, as they probably have more in Ireland than in this country. Now, the statement made at the meeting, that the Company had no property at all, is sufficient to warrant us in awarding this proceeding. Undoubtedly, the *scire facias* will state that Mr. Emery is a shareholder in the

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Company who has not paid up his shares, and also the amount paid on each respective share; all those facts will be stated in the *scire facias*, and are traversable matters, to be decided by a jury. It is enough to say that a *primâ facie* case has been made out. This rule, therefore, must be made absolute.

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ALDERSON, B. :

It is clear that there is *primâ facie* evidence as to the first three points, all three of which may be put in issue by pleas to the *scire facias*. Then, as to the fourth, it was, properly, much argued by Mr. Slade, and I thought at one time the argument would be successful, that in order to found the jurisdiction of the Court, we must be satisfied that the point might be raised by *scire facias*, how the party has endeavoured in England to obtain satisfaction for his debt; but that is, in truth, a matter for the discretion of the Court, whether the *scire facias* is to issue, and that must depend on the decision of the question, whether there is reasonable evidence of property elsewhere, which might be made available for payment from the funds of the Company. If, therefore, it had appeared that there was abundance of property in Ireland, which the party might attain by proper application, I should say that under such circumstances we ought not to grant a *scire facias*. But, as it appears that it was stated by Mr. Emery, at the meeting of the Company, that the Company had no funds whatever, I think the discretion of the Court will be rightly exercised in acceding to the plaintiff's application.

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PLATT, B. :

I am of opinion that the *scire facias* ought to go, as otherwise great inconvenience would arise. The facts in litigation between parties ought to be tried by a jury without the intervention of an issue, which is not pointed out by this statute. Facts should not be submitted to the tribunal of this Court; for it is not our duty to try facts, but to expound the law, and facts are for the jury. As to issuing a *scire facias* in cases like the present, there is no difficulty. A *scire facias* is, in a certain sense, an original action; but here it is in truth a continuation of the original cause of action—it is a *scire facias* on a judgment, which is a continuation of the old cause, giving the party against whom it takes place an opportunity of traversing the facts therein stated. I think, therefore, that this *scire facias* should go; the facts before us are, in my

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judgment, quite sufficient to award this proceeding. My learned brothers have sufficiently stated the grounds upon which they found their opinions, and I can only add that I agree in the opinions so expressed. The rule, therefore, will be absolute.

Rule absolute.

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Nov. 7.

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THE LONDON AND NORTH WESTERN RAILWAY COMPANY v. M'MICHAEL.

(5 Ex. 855—856; S. C. 20 L. J. Ex. 6; 14 Jur. 987.)

Under s. 28 of the Companies Clauses Consolidation Act, 1845, the register of shareholders, having thereon the seal of the Company, is admissible in evidence, without proof that the seal was duly affixed to the document at an ordinary meeting of the Company, in pursuance of the provisions of the 9th section of the Act.

DEBT for calls. The defendant pleaded, first, that he was not indebted *modo et formâ*; and secondly, that he was not the holder of the shares. Issues thereon. At the trial of the cause, before Cresswell, J., at the last Liverpool Summer Assizes, the register of the shareholders of the Company, bearing the seal of the Company, and produced from the office of the secretary of the Company, was offered in evidence on the part of the plaintiffs. The admissibility of this document was objected to, on the ground that it ought also to have been shown that the seal was affixed at a meeting of the Company, pursuant to the provisions of the 9th section of the 8 & 9 Vict. c. 16. The learned Judge, however, overruled the objection, and admitted the document. The plaintiffs having obtained a verdict,

Cleasby now moved for a rule *nisi* to set that verdict aside, and for a new trial, on the ground that the evidence was improperly received:

The mere production of the register was not sufficient to make it admissible in evidence. It is true that the 27th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, enacts, that, in actions for calls, "it shall be sufficient to prove that the defendant, at the time of making the call, was a holder of one share or more in the undertaking, and that such call was in fact made, and notice thereof given as is directed by this and the special Act; and it shall not be necessary to prove the appointment of the directors who made the call, or any other matter whatsoever."

And the 28th section, upon which the plaintiffs relied, proceeds "to enact that the production of the register of shareholders shall be *prima facie* evidence of the defendant being a shareholder, and of the number and amount of his shares." But the 9th section enacts that "the Company shall keep a book, to be called the 'Register of Shareholders;' and in such book shall be fairly and distinctly entered, from time to time, the names of the several corporations, and the names and additions of the several persons entitled to shares in the Company, together with the number of shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares; and the surnames or corporate names of the said shareholders shall be placed in alphabetical order; and such book shall be authenticated by the common seal of the Company being affixed thereto; and such authentication shall take place at the first ordinary meeting, or at the next subsequent meeting of the Company, and so from time to time at each ordinary meeting of the Company." This section requires the instrument produced to be the complete register, and therefore it requires proof that the seal of the Company was affixed at an ordinary meeting of that body; and unless such proof be given, the 28th section does not make the document admissible.

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POLLOCK, C. B. :

If such an argument were to be allowed to prevail, it is difficult to see where the matter would stop; for it would be contended, upon the first opportunity, that the meeting at which the seal was affixed ought to be shown to have been properly convened; and, after that, some further proof might be insisted upon for the purpose of establishing some additional matter. The production of the register is sufficient: that is clear.

ALDERSON, B. :

The objection is a novel one, for this proof has been admitted over and over again.

PARKE, B., concurred.

Rule refused.

The council of the borough of L., previously to making a borough rate, made an estimate under the 5 & 6 Will. IV. c. 76, s. 92 (2), which estimate contained (amongst others) the two following items: "Compensation to the late town clerk, three years and a half, 105*l.* 14*s.* 10*d.*, law expenses 800*l.*" The first of these items was, as it expressed, an award of compensation to a former town clerk, who had been dismissed from his situation by the corporation. The second item had been included in the estimate to meet the demand of the attorney to the corporation for costs and disbursements. The attorney had paid the sum of 467*l.* to a party to save the corporation from an execution; and this sum was one of the items included in the charges as a disbursement. At the time the estimate was made, the attorney had not delivered any signed bill of costs to the corporation. The council afterwards made a borough rate, which included the sums so mentioned in the estimate. At a meeting, which was not a public one, the borough council made an order, which directed the overseers of certain parishes within the borough to pay the proportions assessed upon their parishes out of the poor rates made and collected; and they also issued a warrant to their treasurer, commanding him, within one hundred days from the date thereof, to demand from the overseers the said proportions. The treasurer issued his precept to the overseers, requiring them, within one hundred days after the receipt thereof, to pay the proportions out of the poor rates made and collected, or to be made and collected. A warrant was issued by the defendants, one of whom was the mayor of Lichfield, and both justices of the borough, against an overseer who had not paid the proportion assessed in his parish. This warrant contained the venue in the margin, and directed a certain sum to be levied by distress of the plaintiff's goods, and provided, that "if within the space of five days next after such distress by you taken, the sum of &c. shall not be paid, then you do sell the said goods;" and concluded thus: "Given under our hand and seal, and under the corporate seal of the said borough city. T. J. (L.S.), M. B. M. (L.S.), justices of the said borough and city. THOMAS (Corporation seal) JOHNSON, Mayor." The defendant Johnson was not stated in the body of the warrant to be mayor of the borough: Held,

First, that a borough rate is valid, though not made in public (3).

Secondly, that, assuming the rate to be retrospective (which, *semble*, it was not), yet being good upon the face of it, no objection to its validity was open as against the defendants.

Thirdly, that the warrant was good notwithstanding it directed the sum to be paid out of the rates to be made and collected; and, fourthly, that it was good, although it directed the overseers to pay the sum within one hundred days after the receipt of the warrant.

Fifthly, that it sufficiently appeared upon the warrant, that one of the defendants was mayor of the borough at the time of making the warrant.

Sixthly, that the warrant of distress appeared to have been issued within

(1) Affirmed in the Exchequer Chamber: see 7 Ex. 452.—J. G. P.
(2) See now 45 & 46 Vict. c. 50, s. 144.—J. G. P.

(3) See 45 & 46 Vict. c. 50, s. 144 (3), and *Harrison v. Stickney* (1848) 81 R. R. 61 (2 H. L. C. 108).—J. G. P.

the jurisdiction of the mayor and justices, as the venue in the matter might be looked at for that purpose; and,

Seventhly, that the warrant was sufficient under the 27 Geo. II., although it did not fix the time for termination of the sale (1).

An action of replevin is maintainable against a person who improperly issues the warrant under which another's goods are distrained.

REPLEVIN of certain goods and chattels of the plaintiff.

Plea (by statute) Not guilty. Avowry: That the goods * taken under a warrant of distress issued by the defendants, justices of the borough of Lichfield, for non-payment of borough rate, "publicly assessed" by the council on a parish within the borough, of which the plaintiff was one of the overseers.

Plea in bar—*De injuriâ*: upon which issue was joined.

At the trial, before Coltman, J., at the Stafford Spring Assizes, 1849, a special verdict was found (so far as is material) as follows: The borough and city of Lichfield is an ancient borough, and one of the boroughs mentioned in schedule A, annexed to the 5 Will. IV. c. 76. After the passing of that Act, there was, and thence hitherto hath been and still is, a body corporate of the borough, by and under the name of "The Mayor, Aldermen, Burgesses of the Borough of Lichfield;" and there was a treasurer of the borough duly appointed in that behalf; and the defendants were, for and during the time aforesaid, two of the justices of peace of and for the said borough. After the passing of the 1 Vict. c. 81, and before and at the time of the making of the borough hereinafter mentioned, the borough fund of the borough was sufficient for the purposes in the first-mentioned statute in behalf specified; and on the 19th of July, 1847, a meeting of council of the borough was held, pursuant to due appointment by notice, and summons, according to the provisions of the 5 Will. IV. c. 76, ss. 69, 92, but which meeting was not a public meeting, the members of the town council and the reporters of the press only being allowed to be present; and at such meeting the council proceeded to make and did make the rate hereinafter mentioned. The special verdict then set out the minutes, which, stating that the council ordered a borough rate to be made on the several parishes within the borough, and that the parish of St. Mary was assessed at 666*l.* 16*s.* 1½*d.*, proceeded thus: "And the council doth hereby, in pursuance of the 1 Vict. c. 81, resolve, order, *and direct the churchwardens and overseers of the respective

(1) Repealed by 11 & 12 Vict. c. 43, s. 36. See now 45 & 46 Vict. c. 145.—J. G. P.

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parishes, townships, hamlets, or places (naming amongst others, St. Mary), to pay the amount of the part or portion of such rate for which such parishes, townships, hamlets, and places shall respectively be liable, out of the poor rates made and collected for such parishes, townships, hamlets, and places, respectively. And the council doth further resolve, that J. Proffit, the treasurer of the said borough and city, do forthwith make a demand in writing on behalf of the council of and from the said churchwardens and overseers of the poor, or any or either of them, of the respective sums hereby assessed and taxed upon such parish, township, &c.; which churchwardens and overseers of the poor are hereby required to levy and pay to the said treasurer of the borough and city such sums so assessed and taxed upon such parish, township, &c., within the space of one hundred days after demand made as aforesaid; and in case such churchwardens and overseers of the poor, or any or either of them, shall refuse or neglect to levy and pay any of the sums hereby assessed and taxed, within one hundred days after demand made as aforesaid, to such treasurer, he shall levy the same by distress of the goods and chattels of such churchwardens and overseers so neglecting or refusing to pay."

The special verdict then set out an estimate of expenses mentioned in the minutes, and which was made at the said meeting of the council. This estimate contained the following amongst other items: "Compensation to the late town clerk, $3\frac{1}{2}$ years, 105*l.* 14*s.* 10*d.*, Law expenses, 800*l.*" The item of 105*l.* 14*s.* 10*d.* was introduced under the following circumstances: One C. Simpson had been town clerk of the borough of Lichfield before and at the passing of the Municipal Corporation Act, and so continued until the year 1844, when he was dismissed from such office by the town council. Whereupon he claimed to be entitled to compensation; and the town council having refused to *assess him any, he obtained from the Court of Queen's Bench a writ of *mandamus*, to which the council made a return, which C. Simpson traversed; and the litigation resulted in a judgment whereby C. Simpson recovered against the council 467*l.* for damages and costs; and in April 1846, a peremptory *mandamus* issued; and in June, 1846, the council awarded compensation to C. Simpson in the shape of an annuity of 30*l.* 4*s.* 3*d.*; but he being dissatisfied therewith had appealed to the Lords of the Treasury, which appeal was still pending at the time of the aforesaid meeting of the council; and the said sum of 105*l.* 14*s.* 10*d.*, being the arrears of the said annuity, was included

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in the estimate, on the ground that the council might be required to pay the same to C. Simpson.

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The item of 800*l.* appearing in the estimate as for law expenses, was introduced under the following circumstances: One Eggington, the town clerk of the borough, had been the attorney for the council in the litigation on the writ of *mandamus*. After C. Simpson had so recovered judgment, and before making the estimate, Eggington, so being such attorney, paid to C. Simpson the sum of 467*l.* out of his, Eggington's, own monies, such sum of 467*l.* being the damages and costs as then ascertained by the Master's allocatur, intending to charge the same to the council as a disbursement in his (Eggington's) bill of costs; but he had not, on the 19th of July, 1847, delivered any signed bill to the council, nor had he been required by them to deliver any, nor had he been required by the council to pay the said sum of 467*l.*, but did so spontaneously, and with a view to save the difficulty and expense of an execution. The item of 800*l.* introduced into the estimate as aforesaid, was so introduced as a sum which, it was estimated by the council, would be required to pay on account of Eggington's bill of costs, charges, and disbursements for that and other suits and business then pending and then unascertained, including *therein, as a disbursement which they would be required to repay, the 467*l.* so paid by Eggington to the agent of C. Simpson.

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On the 19th of July, 1847, a precept or warrant, signed by the mayor of the borough, and sealed with the corporate seal, was, by order of the council, issued to J. Proffit. The special verdict set out the warrant, which commenced thus: "We, the council of the borough and city of Lichfield, by virtue of an Act passed &c. (5 & 6 Will. IV. c. 76) do hereby command you, J. Proffit, within one hundred days from the date hereof, to demand, collect, and receive of and from the churchwardens and overseers of the poor of the several parishes, &c., the several sums (naming them) respectively taxed and assessed upon the said parishes by order of the council towards a borough rate, &c."

Thereupon, Proffit, on the 19th of July, 1847, made his precept to the churchwardens and overseers of St. Mary, which, after reciting the order and warrant of the council, proceeded thus: "These are therefore to require you, and I do hereby demand, that, within one hundred days next after the receipt hereof by you or any of you, or after leaving a written copy at your or any or either of your dwelling-houses, &c., you do pay to me, as such treasurer

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as aforesaid, out of the poor rates made and collected, or to be made and collected, the sum of 666*l.* 16*s.* 1½*d.* so rated and assessed, on the parish of St. Mary," &c. On the 29th of July, 1847, a written copy of such precept was left at the dwelling-house of, and then received by, the plaintiff, he being one of the overseers of St. Mary.

The plaintiff appealed against the rate, and it was confirmed. Afterwards, the churchwardens and overseers of St. Mary paid to Proffit, on account of the sum of 666*l.* 16*s.* 1½*d.*, the sum of 519*l.* but not the residue of that sum. The plaintiff went out of office as overseer on the 30th of March, 1848. On the 11th of July, 1848, being after the expiration of the period of one hundred days, the

[*867] *plaintiff was summoned before the defendant Thomas Johnston, the mayor of the borough, and the other defendant B. Morgan, a justice of the peace of the borough, upon the complaint of Proffit, to show cause why a warrant of distress should not forthwith issue, to levy 153*l.* 16*s.* 1½*d.*, the balance of the 666*l.* 16*s.* 1½*d.* On the day named in the summons, the plaintiff attended before the defendants, and promised that the residue should be paid, and did before the 3rd of August pay to Proffit the further sum of 76*l.* on account of the sum of 153*l.* 16*s.* 1½*d.* On the 3rd of August, 1848, being the day to which the further hearing of the complaint was adjourned, the plaintiff did not attend; and on the 10th of August a warrant, which then bore date that day, was signed and sealed by the defendants, and delivered to Eggington, the town clerk, for the purpose of having the corporate seal affixed thereto; and Eggington altered the same, as to the date thereof, to the 14th of August, 1848, and such alteration was made with the assent and direction of the defendants, and the same was afterwards re-signed and re-sealed, and the corporate seal affixed thereto; which warrant is as follows:

Borough and City of Lichfield.	}	<p>"To J. Proffit, of &c., treasurer of the said borough and city," &c. (After reciting that the parish of St. Mary was by the council assessed at 666<i>l.</i> 16<i>s.</i> 1½<i>d.</i>, and that the churchwardens and overseers were ordered to pay that sum out of the poor rate made and collected, or to be made and collected, it proceeded thus:) "And whereas it duly appeareth unto us, two of her Majesty's justices of the peace for the said borough and city, and one of us being the mayor of the said borough and city, that J. Proffit issued his precept," &c. (It then recited the service of the precept on the churchwardens and overseers; their neglect to pay the balance; and that they were duly summoned &c.,</p>
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and proceeded thus:) "These are therefore to require you forthwith to make and *levy the sum of 77*l.* 16*s.* 1½*d.*, being the balance of the sum of 666*l.* 16*s.* 1½*d.*, by distress of the goods of W. Maunder and R. Harris, churchwardens, and E. Jones and J. Gilbert, lately overseers of the poor as aforesaid; and if within the space of five days next after such distress by you taken, the sum of 77*l.* 16*s.* 1½*d.* together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods so by you distrained; and out of the monies arising out of such sale, that you detain the said last-mentioned sum, and also your reasonable charges, &c.

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"Given under our hands and seals, and under the corporate seal of the said borough and city, this 14th day of August, A.D. 1848.

"THOMAS JOHNSON. (L.S.)

"M. B. MORGAN. (L.S.)

"Justices of the said borough and city.

"THOMAS (C.S.) JOHNSON."

Under the above warrant Proffit took the goods and chattels of the plaintiff, and kept the same until they were replevied.

Gray (Keyser with him) for the plaintiff :

First, the rate is bad, inasmuch as it was not made at a public meeting. By the Municipal Corporation Act, 5 & 6 Will. IV. c. 76, s. 92 (1) the council of any borough are authorised and required "to order a borough rate, in the nature of a county rate, to be made within their borough; and for that purpose the council of such borough shall have within their borough all the powers which any justices of the peace, assembled at their General or Quarter Sessions, have, by virtue of the 55 Geo. III. c. 51, or as near thereto as the nature of the case will admit," &c. The 55 Geo. III. c. 51, ss. 1, 12, empower justices of the peace "assembled at their General or Quarter Sessions," to make and assess a county rate whenever circumstances appear to require it. Therefore, *by that Act, the rate is to be made publicly. But any doubt which may have existed with respect to the 55 Geo. III. c. 51, is removed by the 4 & 5 Will. IV. c. 48, s. 1. * * *

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(PARKE, B.: No reference is made to that statute in the 5 & 6 Will. IV. c. 76.)

(1) See now 45 & 46 Vict. c. 50, s. 144.—J. G. P.

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By the 5 & 6 Will. IV. c. 76, the borough council have only such power as the justices under the 55 Geo. III. c. 51; and the latter have only a power to rate publicly.

Secondly, the rate is in part retrospective, for it was made to repay the arrears of the late town clerk's salary, and also to reimburse the attorney of the council the sums which he had paid in respect of damages and costs. [He cited *Woods v. Reed* (1).]

[870] (PARKE, B. : In Rogers's Eccles. Law, p. 1008, note, it is laid down, that it is no objection to a church rate that it is retrospective, and reference is made to *Chesterton v. Farlar* (2).)

In consequence of the decision in *Woods v. Reed*, the 1 Vict. c. 81 (3), was passed; the 2nd section of which enables the council of any borough, within six months after the passing of that Act, to make and levy a borough rate, for the purpose of defraying any expenses previously incurred in putting in execution the provisions of the Municipal Corporation Act.

(PARKE, B. : Were the council bound to make a rate upon the chance of their being defeated and having the costs to pay? When is a rate to be made, if an action is pending, the result of which is so uncertain, that possibly the corporation may have to pay 1,000*l.*, or perhaps they may receive their full costs?)

The expenses are incurred as soon as there is a judgment against the corporation.

(PARKE, B. : By the 5 & 6 Will. IV. c. 76, s. 92, the council is "authorised and required from time to time to estimate, as correctly as may be, what amount, in addition to the borough fund, will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of that Act.")

ALDERSON, B. : On what principle are they to make the estimate? Take for instance the expenses of prosecuting felons at the Assizes; how can they possibly estimate what the probable expenses may be in the following year?)

Here the expenses were not only incurred, but actually paid before the rate was made.

(1) 46 R. R. 761 (2 M. & W. 777).

(2) 7 Ad. & El. 713.

(3) Repealed by 45 & 46 Vict. c. 50:

see now sect. 144 (2) of that Act.—
J. G. P.

Thirdly, the 1 Vict. c. 81 (1), authorises the overseers of every parish liable to the borough rate, to pay the amount "out of the poor rate made and collected, or to *be made or collected for such parish." Here the council by their order directed the overseers to pay "out of the poor rates made and collected;" they then issue their warrant to the treasurer, who, by his precept, requires the overseers to pay the amount "out of the poor rates made and collected, or to be made and collected." The introduction of those latter words into the precept vitiates the proceedings.

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Fourthly, the 55 Geo. III. c. 51, s. 12, empowers the justices to order warrants to be issued to the constables, requiring them to issue their warrants to the overseers to collect the rates "within a time to be named and limited in the warrant." Here the treasurer by his precept requires payment to be made "within one hundred days next after the receipt of the precept;" whereas the warrant of the council commands him to demand payment within one hundred days from the date of the warrant to him.

(PARKE, B. : The treasurer extends the time of payment, so that there is no ground for complaint; if he had narrowed the time, it might have been urged that the money would have been paid if the full time had been allowed.)

This course puts it in the power of the treasurer to favour any one parish.

Fifthly, it does not appear in the body of the warrant that the defendant Johnson was mayor of the borough at the time the warrant issued. Besides, the justices were *functi officio*, so soon as they had signed the warrant of distress, and consequently the alteration in the warrant rendered it void.

Sixthly, it does not appear on the face of the warrant, that the justices were acting within their jurisdiction. They merely describe themselves as "justices of the said borough and city," and do not use the ordinary words "in and for" the city &c. In *Reg. v. The Inhabitants of Stockton* (2) it was held, that an order of removal, having *the marginal venue "Borough of K.," and commencing "upon the complaint of the churchwardens, &c., unto us G. and T., being two of her Majesty's justices of the peace for the said borough of K.," did not sufficiently show that the justices heard the complaint within their jurisdiction.

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(1) Repealed by 45 & 46 Vict. c. 50: J. G. P.
see now sect. 144 (2) of that Act.— (2) 7 Q. B. 520.

said "that it is safe, but perhaps not necessary, in the body of the warrant to show the place where it was made; yet it seems necessary to set forth the county in the margin at least, if it be not set forth in the body.")

Lastly, the warrant of distress is bad, for not complying with the requisitions of the 27 Geo. III. c. 20. By the 1st section of that statute, justices granting warrants of distress are therein to order the goods distrained to be sold "within a certain time to be limited in such warrant, so as such time be not less than four days nor more than eight days," &c. This warrant does not limit any time within which the goods are to be sold.

(PLATT, B.: The word "then" points to the time.

PARKE, B.: The goods are to be sold immediately after the five days have expired.)

In *Reg. v. Williams* (1), a warrant of distress, which directed the goods to be sold "forthwith," was held bad.

Keating (*Whitmore* with him) for the defendants:

First, the meeting of the town council, at which the rate was made, was a public meeting, duly convened according to the provisions of the 69th section of the 5 & 6 Will. IV. c. 76. It was not necessary that the doors should be thrown open to the public.

(POLLOCK, C. B.: The council of a borough does not hold an open Court.)

The meaning of the 92nd section of that Act is, that the borough council, when properly convened, shall have the same powers as justices at Sessions.

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(ALDERSON, B.: The 4 & 5 Will. IV. c. 48, was *passed in consequence of the discordant practice which had prevailed in various counties in making county rates. In some cases the meetings of the magistrates were private, in others they were public.)

Justices are in the situation of assessors appointed by the Crown, while the borough council are a representative body; and therefore

(1) Q. B., Feb. 1, 1850.

it is reasonable, that the public should be admitted in the one case, while they are excluded in the other.

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(ALDERSON, B.: The sitting in public is not a "power," but rather a "restriction.")

He referred to *Rex v. The Justices of Nottingham* (1).

Secondly, the rate is not bad on the ground of its being retrospective. *Woods v. Reed* does not touch the present case, for it related to a different description of expenses, and concerning which a strictly prospective rate might have been made. Here there are some expenses which cannot be provided for prospectively, as, for instance, law expenses, of which it is impossible to make a correct estimate beforehand. Or suppose a dismissed officer claims 500*l.* a year, while the council consider him entitled to nothing, how can they make an estimate of what he may possibly recover? This rate is as prospective as it could be under the circumstances. In *Reg. v. Read* (2), it was held, that although rates are not to be made retrospectively, yet when overseers, by reason of a balance in hand of an old rate, or the getting in of an uncollected rate on which a particular debt is chargeable, are enabled to defer the making of a new rate, such debt may be properly paid out of the new rate, and that this applies peculiarly to the expenses of litigation. It would be a matter of great and almost insurmountable difficulty to make a rate with extreme strictness. If, for instance, too large a sum for future expenses were to be estimated by the council, it would be a hardship to the existing ratepayers; or *if, on the other hand, the sum were too small, there would be a difficulty in obtaining the balance, for it would then be said that the rate was retrospective. If, therefore, the council make their estimate fairly and reasonably, any rate subsequently assessed to provide for the deficiency ought not to be considered as a retrospective rate. This is in accordance with the view taken by the MASTER OF THE ROLLS in *The Attorney-General v. The Corporation of Lichfield* (3) [and *Marshall v. Pitman* (4)]. If the rate is not wholly bad, the plaintiff cannot raise the question in the present form of proceeding. For, according to his argument, if the estimate were incorrect in the smallest *particular, the whole rate would be

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(1) 3 Ad. & El. 500.

(3) 17 L. J. Ch. 472.

(2) Q. B., May 4, 1849 [13 Q. B. 849].

(4) 35 R. R. 630 (9 Bing. 595).

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bad. The recent case of *George v. Chambers* (1), no doubt, decided that replevin will lie against the party who takes the goods and has the custody of them; but it is not an authority that the action will lie against the magistrates, who have neither taken the goods nor have the custody of them. The authorities are collected upon this subject in Dodd's edition of *Bac. Abr.* "Replevin," (C).

(PARKE, B.: Surely replevin lies in all cases against a party by whose order goods have been improperly taken. We considered that matter well in the case of *George v. Chambers*. I do not think that such an objection is likely to prevail.)

Thirdly, the introduction of the words "to be made and collected" into the precept does not vitiate the proceedings. Those words do not necessarily refer to the date of the warrant, but may be understood as meaning any rate that might be afterwards made and collected. The plaintiff has not been damnified by it.

Fourthly, it is no objection that the time of the payment has been extended from a period of one hundred days from the date of the warrant, to that of one hundred days from the date of the precept; for it is a benefit to the party who is required to make the payment.

(ALDERSON, B.: The Act means, that the time allowed is not to be less than one hundred days.)

Fifthly, it sufficiently appears upon the face of the warrant that the defendant Johnson was mayor of the city of Lichfield at the time the warrant was issued; for both his signature appears upon it, and the corporate seal is affixed to it. The re-signature of the warrant before it was issued is immaterial.

(Per CURIAM: There is nothing in that objection.)

[*876] Sixthly, it also appears that the warrant was issued within the jurisdiction of the justices. In *Reg. v. Stockton* (2), *the complaint of the overseers was not set out, and therefore it did not appear to have been made within the jurisdiction. Here, although there are not the words "in and for," which the plaintiff contends should have been present, yet the words "Borough and city of Lichfield" appear in the margin. The warrant is also signed by the justices,

(1) 63 R. R. 554 (11 M. & W. 149).

(2) 7 Q. B. 520.

and has the corporate seal affixed to it. The fair presumption therefore is, that the order was made within the jurisdiction.

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Lastly, the warrant is sufficient, although it does not fix a limit within which the sale of the goods is to terminate. It is in conformity with the precedents. It is in effect a direction to the officer to sell at the expiration of the fifth day.

Gray replied, and cited *Pallister v. Mayor of Gravesend* (1), *Tawny's case* (2), *Lanchester v. Tricker* (3), and *Rex v. Sillifant* (4).

POLLOCK, C. B. :

I am of opinion that the defendants are entitled to judgment. The cases cited by the plaintiff's counsel are apparently authorities that rates must not be retrospective; but the case of *Woods v. Reed* merely decided that a borough rate, which upon the face of it was retrospective, could not be sustained. In my opinion it never could have been intended that so many difficulties should be thrown in the way of making a rate. We ought therefore to give such effect to the words of the statute as will best meet the exigencies of the case. The Legislature has provided that the borough council is to make an estimate, if that can be done, for the purpose of providing prospectively for those expenses. It may, however, happen that this may not be possible, although made with all *due care and fairness. It may be that the prospective estimate will fall short of the demand upon it, or persons may fail to pay their rates, or the rate may become unproductive from some other cause. It is impossible for the council to guard against all such matters. It therefore appears to me that under such circumstances, if a rate is made prospectively, and it turns out to be inadequate to the occasion, and another rate is requisite, it is competent to the council to make it. But the question here is, whether this rate is prospective or retrospective; and I am of opinion that in point of fact it is prospective, for it was made *bonâ fide* and for the purpose of providing for payments which it was expected would become payable thereafter. I therefore think that the rate was not retrospective; but I doubt whether it would have been bad if we had held it to be retrospective. The object of the statute was to enable the council to pay their debts, and we ought to construe the clause applicable to this point as directory only,

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(1) 82 R. R. 522 (9 C. B. 744).

(3) 1 Bing. 201.

(2) 2 Salk. 531.

(4) 4 Ad. & El. 354.

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in all cases where the council act *bonâ fide*. With regard to the objection that the rate ought to be made in public, it is a sufficient answer that the Municipal Corporation Act has given generally to town councils as nearly as possible the same power on this subject as to county justices assembled in Quarter Sessions. And what strengthens my opinion that the meeting of the council need not be a public one is, that the Municipal Corporation Act does not refer to the 4 & 5 Will. IV. c. 48, which directs justices to make county rates in open Court. The 92nd section of the Municipal Act is the section that applies to the present case. But the council is not a Court, whereas the Quarter Sessions are a Court, and the meetings of the council take place in private. It is, therefore, no objection to the validity of this rate that it was not made in public. As to the objection relating to the hundred days mentioned in the order and precept, I think the defendants' counsel has given a sufficient answer to it. *With respect to the other points, I think the meaning of the order of the council is, that the money is to be raised out of the rates made and collected or to be made and collected. I also think there is no force in the objection to the warrant, that it does not contain a distinct statement of the jurisdiction in the body, as the venue sufficiently appears in the margin. Then as to the objection, that it does not appear that the defendant Johnson acted as mayor, his signature may be taken into account, in the same way as the date of a letter may be looked at to see at what time or place it was written. The last objection is of no weight; and therefore, as all the objections which the plaintiff has raised altogether fail, the defendants are entitled to our judgment.

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PARKE, B. :

I am of the same opinion. As to the first objection, that the rate was void, inasmuch as the council ought to have sat openly and in public upon the occasion when they made the rate, that objection is founded partly on the avowry, and partly on the language of the Act of Parliament. Now the avowry states, that the council "publicly rated, taxed, and assessed the parishes, &c., constituting the borough;" and so far as the rate is stated to have been made in public, the avowry is not supported by the evidence. But that statement is mere surplusage, unless the council is bound to sit for the transaction of business with open doors. The Municipal Corporation Act directs the borough council to make a borough rate in the nature of a county rate. The 4 & 5 Will. IV.

c. 48, applies only to the proceedings of county justices, whose practice in making county rates varied in different districts, it being usual in some counties to make them publicly, in others privately. The town council of a borough is not, however, a Court, and is not bound to sit with open doors; and if the Legislature had intended that that should be the practice, they would not have omitted in the Municipal Corporation Act *all reference to the 4 & 5 Will. IV. c. 48, which directs that county justices at Quarter Sessions shall so sit when making rates for the county. It is therefore no objection to this rate that it was not made in public. The next question is, whether this rate is bad as being retrospective, on the ground that the estimate of the council included by-gone expenses; and the principal objection is, that the solicitor of the corporation paid a certain sum of money for costs, to save the corporation from an execution, which sum was to be included in the bill that he had not then delivered. I think this circumstance does not affect the question as against the defendants; for they issue their warrant in respect of a rate which, upon the face of it, is perfectly good. The council have estimated the money which is to be repaid to the solicitor; and although the rate be in fact made in part for by-gone expenses, it is not a bad rate as regards the defendants, unless it be clear on the face of it that it was meant to include by-gone expenses. In *Chesterton v. Farlar*, which has been referred to, in a suit for the nonpayment of a church rate, a prohibition was moved for to the Privy Council, to which an appeal had been made, on the ground that the rate appeared to be retrospective and bad from what appeared upon the pleadings. This Court refused a prohibition, the cause being before a Court the jurisdiction of which was not denied, no erroneous proceeding having taken place there, and the Court refusing to presume that the Judicial Committee would act incorrectly. *Rex v. Sillifant* seems to show that where a rate was regular on the face of it, but appeared to have been made to meet past disbursements, it was not therefore bad, whatever objection might be raised to a retrospective application of the money in passing the churchwardens' accounts. Therefore, in the present case, if the town council were wrong in making a retrospective rate, no advantage can be taken of that fact in an action against the defendants in this case, being the *magistrates who enforce the rate by distress. I by no means say that the town council were wrong in the course they took. They thought they were right, and there was nothing fraudulent

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in their conduct. Some latitude must be allowed them under the circumstances; for they cannot ascertain in all cases with exactness the amount of money that will be wanted, but are bound to raise, as nearly as possible, the sum that will be required. I, therefore, do not say that this order of the council was not warranted. In *Woods v. Reed*, the only point decided was that, under the Municipal Corporation Act, the borough council had no power to make a retrospective rate. But there the expenses were clearly by-gone; here it is doubtful whether they are so. Again, supposing the expenses to be by-gone, and the rate to be good upon the face of it, the time for making the objection is when the accounts are allowed. The next objection is, that the precept does not follow the order of council, which is a departure from the Act, which authorises the council to require payment of the borough rate out of the "poor rates made and collected, or to be made and collected," whereas the order is for payment out of the "poor rates made and collected" only. Now it appears that by that statute, 55 Geo. III. c. 51, the overseers are empowered to make a rate in order to raise the sum assessed on the parish, or to reimburse themselves by a rate, so that the money may either be ordered to be paid out of a rate already made, or a special rate may be made for the purpose. But it is said that there is a variance between the precept and the order of council; the latter limiting the payment required to be made out of the rates already "made and collected." Now the words of the statute are not to be construed with extreme strictness. The Act of Parliament directs the payments to be made out of a rate "made or to be made." All that is meant is that the payments are to be made out of the poor rates; and the words in the order of council, "made and collected," may be taken substantially to mean such rates as shall be made and collected at the time of payment. The next objection is, that the precept was not warranted by the order of council, which directs the overseers to pay their proportions within one hundred days after service upon them of the order, whereas the precept requires the overseers to pay the amount within one hundred days after demand. But the precept does not limit the time for payment given by the order under the 55 Geo. III. c. 51, but on the contrary extends it. The overseers, therefore, have had the whole of the one hundred days from the time of the service of the demand upon them, to pay the rate. The next objection is, that the warrant does not support the avowry, which alleges that the defendant

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Johnson in granting it acted as mayor. This is a purely technical objection, and cannot prevail. There is no authority for saying that the signature may not be looked at and considered as part of the warrant. It is then said that the warrant is invalid, by reason of its being altered after it was issued, but this is not the case. The date was altered whilst it was in the possession of the justices, before it was issued, and they were clearly at liberty to alter it at that time. The next objection is, that the warrant is defective on the face of it, for not showing that the justices were acting within their jurisdiction at the time it was issued by them; and *Reg. v. Stockton* was cited. But it does appear to have been issued within the jurisdiction, for we may take the venue in the margin as constituting the place of making the warrant; and, in addition to that, the passage in 2 Hawk. P. C. bk. 2, c. 13, s. 23, which was cited by me during the argument, is conclusive. The next objection arises on the 27 Geo. II. c. 20. It is said that the warrant of distress does not fix the limit of the sale, and that there ought to be some limit fixed. Now the statute 27 Geo. II. c. 20, enacts, that the time for selling the goods shall "be limited in such warrant, so as the time shall not be less than four days nor *more than eight." [*882] The obvious meaning of that section is, to fix the time within which the party distrained on may save his goods by tendering the amount due with the costs. Here the warrant does specify five days as the time allowed for payment, and then the officer is directed to effect the sale. The warrant, it is true, does not say when the sale is to be completed, but that is not necessary. This warrant pursues the ordinary course of the precedents. If, indeed, the warrant had directed the sale to take place forthwith, it would be bad, as it would not then give the party distrained upon sufficient time to turn about him and to procure the means of payment. This was determined by the case of *Reg. v. Williams*, which has been referred to. On the whole, I am clearly of opinion that the warrant was good. The objections, therefore, are all answered, and the defendants are entitled to judgment.

ALDERSON, B., and PLATT, B., concurred.

Judgment for the defendants.

1850.
Nov. 5.

DOE D. CHILDE AND OTHERS *v.* WILLIS (1).

(5 Ex. 894—904; S. C. 20 L. J. Ex. 85.)

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By the provisions of a scheme for the management of King Edward the Sixth's Grammar School at Ludlow, duly confirmed by the LORD CHANCELLOR, it was declared that the trustees should have authority, upon such grounds as they should, at their discretion, in the due exercise and execution of the powers and trusts reposed in them, deem just, from time to time to remove the master, usher, &c., from his office, subject, however, to certain formalities being observed: Held, that these words conferred an absolute discretionary power upon the trustees, provided the formalities specified were followed; and that they were not bound to summon the master before them, or to give him any hearing or opportunity of defending himself against the charges which formed the ground of his removal.

By an order, the LORD CHANCELLOR, in whom the power of appointing new trustees was vested, referred it to the Master to approve of eight fit and proper persons to be appointed trustees in lieu of those dead, or who had left the borough of L.; and after his report, such further order was to be made as was just. The Master reported that he had approved of eight persons as fit and proper to be appointed &c. This report was confirmed; and, in the confirmation, the trustees of the charity (naming the said eight persons and the other trustees) were directed to pay the costs of the petition for the appointment of new trustees out of the surplus funds of the charity in their hands. By the private Act, the property of the trust was vested in the trustees for the time being, without any deed of transfer: Held, that this was a valid appointment of the eight new trustees by the LORD CHANCELLOR.

EJECTMENT to recover the possession of certain houses and premises occupied by the defendant, as head master of the Ludlow Grammar School of King Edward VI.

At the trial, at the Shropshire Summer Assizes, before Williams, J., it appeared that the lessors of the plaintiff claimed as trustees of the Ludlow Municipal Charities. The school in question was founded by charter of Edward VI., dated the 26th of April, 1552; the powers of appointment and amotion being thereby given to the old corporation of Ludlow. These powers, and generally the power to make orders for the administration of the charity, were, by *the 5 & 6 Will. IV. c. 76, s. 70, transferred to the LORD CHANCELLOR. In pursuance of this authority it was, by order of the LORD CHANCELLOR, dated the 26th day of August, 1886, referred to Master Brougham to appoint new trustees for the said charity. By his report, dated the 16th of February, 1887, he appointed seventeen persons to be such trustees (nine of whom were lessors of the plaintiff); and this order was confirmed by the LORD CHANCELLOR on the 3rd of December, 1887.

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(1) See *Willis v. Childe* (1851) 13 *Rugby School* (1874) L. R. 18 Eq. 28, Beav. 117; *Hayman v. Governors of* 73, 43 L. J. Ch. 834.—J. G. P.

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On the 25th of July, 1838, the defendant was duly appointed head master of the school, and entered upon his duties. An information was for many years pending as to the administration of the charities; and to settle these disputes, on the 27th of July, 1846, an Act was passed, 9 & 10 Vict. c. xviii. (1), by which the trustees were to hold the property upon the uses and trusts to be declared by a scheme to be settled by the Master. This scheme was duly settled and confirmed on the 2nd of August, 1848. The 14th rule was as follows: "That the said trustees shall have authority, from time to time, upon such grounds as they shall at their discretion, in the due exercise and execution of the powers and trusts reposed in them, deem just, from time to time to remove the master, usher, or *any additional master or masters, or either of them, from their or his offices or office, in the manner herein-after mentioned; that is to say, that on the requisition in writing, signed by three of the trustees at least, the secretary of the said trustees shall call a meeting of the said trustees, a notice in writing being given or sent to each of the said trustees six days before the holding of such meeting, and in such notice it shall be stated that at the said meeting it is intended to propose the removal from the said office of master, usher, or additional master or masters, of the person whose name shall be in the said notice; and that at the same meeting there shall be present not less than two-thirds of the trustees for the time being; and that at the said meeting a resolution shall be proposed by one and seconded by another of the trustees, for the removal of such master, usher, or additional master or masters; and that if the same be carried by at least two-thirds of the trustees so present, the same shall be entered on the minutes of the said trustees, and signed by such of them as vote for the said resolution; and that, if the said resolution shall at a subsequent meeting of the said trustees, called by such notice as

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(1) By the 25th section of that Act it is enacted, "That in the construction of this Act the word 'trustees' shall, when used with reference to the said charity property, be deemed and taken to mean and comprise the persons who from time to time shall be the trustees of the said charity; and that when and so often as any person or persons shall have been duly appointed trustee or trustees of the charity property, real or personal, then and in every such case, by virtue of such appoint-

ment alone, and without any deed or instrument, conveyance, surrender, or assignment whatsoever for that purpose, all the property, real or personal, belonging to the said charity, shall forthwith be and be deemed to be vested in such new trustee or trustees as aforesaid, either alone or jointly with the surviving, continuing, or other trustee or trustees of any of the same property, upon and for the trusts and purposes of the said charity."

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last hereinafter mentioned, and in which notice shall be set forth the former resolution, and at an interval of one calendar month at least, whereat the same proportion of trustees at least shall be present as is required to be present at the first meeting, be confirmed by two-thirds of the said trustees then present, the said master, usher, or additional master or masters shall be considered as removed as on the day of the said second meeting, and his office shall be vacant on and from that day: Provided that such resolution and the confirmation of it as aforesaid, together with the grounds of such removal, shall be entered and preserved upon the minutes of the proceedings of the said trustees."

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On the 20th of May, 1848, an order was made by the LORD CHANCELLOR, referring it to Master Brougham to approve of *eight fit and proper persons to be appointed trustees of the said charities in the place of those dead and having quitted the borough of Ludlow; and after his report, such further order was to be made as was just. On the 28th of February, 1849, the Master made his report, and after reciting (*inter alia*) that eight persons (naming them) had been proposed as fit and proper persons to supply the vacancies existing among the trustees, he reported that he approved of the said persons as fit and proper persons to be appointed trustees of the charities affected by the 71st section of the 5 & 6 Will. IV. c. 76, in the place of those dead and having quitted the borough. By an order of the LORD CHANCELLOR, dated the 28th of April, 1849, it was ordered, that the Master's report should be confirmed; and it was further ordered, that the trustees of the said charities (naming the nine old and eight new trustees) do pay the costs of the petition for the appointment of the new trustees out of the surplus funds in their hands belonging to the said charity, called "The Free Grammar School."

The trustees met frequently in the course of the year 1849, and passed certain rules as to the management of the school. Disputes occurred between them and the defendant; and on the 16th of January, 1850, a special meeting was called pursuant to a notice addressed to the secretary, stating, that it was intended to propose the removal of the defendant from the mastership. The meeting took place, and the resolution for his removal was carried and signed by fourteen of the trustees, and the grounds thereof stated. All the formalities required by the 14th rule of the scheme were fulfilled. The defendant had not, however, any notice of the meeting, or any opportunity afforded to him to answer the charges,

which he alleged were untrue in fact. By letter dated 18th February, 1850, he claimed the right to be heard in his defence, and he was allowed to be present at the meeting held on the 20th of February, pursuant *to the said 14th rule, to confirm the resolution. Some discussion took place, but no regular inquiry into the truth of the charges; and the resolution was confirmed, the confirmation being signed by the same fourteen trustees who had signed the resolution. A demand of possession of the school-house and premises was subsequently made; and upon refusal to quit it this action was brought. Proceedings in equity had been taken by the defendant, but an injunction had not then been obtained.

Upon these facts, and no evidence further being offered to establish the truth or sufficiency of the charges against the defendant, it was objected on his part, that the resolution to remove him was invalid, as he had not had any notice of the charges, or any opportunity of defending himself; that it was incumbent upon the trustees to prove to the satisfaction of the jury the sufficiency of the charges; and secondly, that the appointment of some of the trustees who were parties to the action was invalid. The learned Judge, however, was of a contrary opinion upon the first point, but reserved leave to the defendant to move to enter a nonsuit upon the second. A verdict having been found for the lessors of the plaintiff,

Whateley now moved for a new trial on the ground of misdirection, or to enter a nonsuit in pursuance of the leave reserved:

The first question is, whether the trustees have an absolute power given them by the 14th regulation, to deprive the master of his situation for any cause which may, in their opinion, justify his dismissal. By the language of that rule, the trustees have authority to remove the master from his office "upon such grounds as they shall at their discretion, in the due execution of the powers and trusts reposed in them, deem just." This does not give the trustees an absolute discretion in the matter, but one which is subject to the proper exercise of the trust reposed in them. The grounds of removal must be just.

(PARKE, B.: *The words of the rule are, "upon such grounds as they shall deem just," and not upon such grounds as shall be just. That appears to make their discretion so far absolute as to prevent

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us from interfering in the matter when they have exercised their discretion. There is a passage to be found in the judgment of the Court of Error in the case of *Reg. v. Governors of Darlington School* (1), where the governors, by the letters patent, had the power given them of removing the master from the school in question "according to their said discretion," which appears to me to be very apposite to the present question. In speaking of this power the late Lord Chief Justice TINDAL says: "and there seems nothing unreasonable in the founders giving such authority to the governors; for there may be many causes which render a man altogether unfit to continue to be a schoolmaster, which cannot be made the subject of charge before a jury, or otherwise of actual proof. A general want of reputation in the neighbourhood—the very suspicion that he has been guilty of the offences stated against him in the return—the common belief of the truth of such charges amongst the neighbours," and so on. In this case, a meeting of the trustees is required, to give them the opportunity of taking the question of the master's removal into their consideration. They may come to the conclusion that the master ought no longer to preside over the school. The school may be losing its scholars. A person may take his son away from the school without giving any definite reason for so doing; and upon the same principle the trustees may, for reasons which may appear to them sufficiently well founded, be of opinion that the master is not a proper person to hold the office any longer.)

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In *The Fremington School* case (2) the trustees were empowered, "upon any neglect or misbehaviour in such master, or other just cause for which *they or the greater number of them should agree upon and think fit, to displace the master." There Vice-Chancellor KNIGHT BRUCE was of opinion that the trustees had not the power of dismissal arbitrarily, but for just cause; and that they were bound to exercise that power according to principles of right, and to the general rules applicable to the administration of justice by the laws of England.

(PARKE, B.: I think *The Darlington School* case is in point, and that this is a matter within their entire discretion, with which we cannot interfere.)

In the second place, the parties who were joined in the present

(1) 66 R. R. 521 (6 Q. B. 716).

(2) 77 R. R. 879 (10 Jur. 512).

action were not all properly appointed trustees. The report of the Master was confirmed by the LORD CHANCELLOR, but that does not amount to an appointment of the new trustees, nor were the old trustees removed.

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(PARKE, B. : It is equivalent to this : "I hereby appoint A. B. in the place of C. D. whom I have removed.")

It was merely a report of the fitness of the parties therein named to act as trustees. The order speaks of the persons "to be" appointed. Some further order therefore was contemplated.

POLLOCK, C. B. :

I am of opinion that there ought not to be a rule in this case. The COURT intimated their opinion, during the first part of the learned counsel's argument, that this is a matter within the discretion of the trustees ; and that, having exercised their discretion, it cannot be questioned by the present proceedings.

With respect to the second point, it appears to me that the LORD CHANCELLOR has absolutely the power to appoint or to displace the trustees. The 25th section of the private Act, which has been referred to, appears to me to have been passed merely with the intention of dispensing with the execution of the deed ; and that whatever would, before that Act, have been a good appointment, whereby the execution of a deed would have been authorised, must now be considered as a good and sufficient appointment for all *purposes to vest the property. Here the question as to the parties who are qualified to act as trustees was referred to the Master for his consideration. I think we need not trouble ourselves about the question, whether certain of those trustees were disqualified. The Master's office is to inquire into all the circumstances, and he has reported it as fit, that, instead of five persons named, and named as being dead, and three others named as being absent, eight persons who are named should be substituted as trustees in their places. The CHANCELLOR says, "I adopt that report." Prior to the passing of the private Act, the immediate result of the adoption of that report would have been, to have caused the execution of a deed transferring the property from one set of trustees to the other. The effect of the Act is, that now, without any such deed, the persons so recommended by the Master and so approved of by the CHANCELLOR, become *ipso facto* trustees. There can be no

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doubt about the meaning of the CHANCELLOR's order ; for, as has been observed by my learned brothers, the order actually treats them as trustees, and directs them to pay the costs out of the fund.

PARKE, B. :

I am of the same opinion. With respect to the first question, whether this is in the discretion of the trustees or not, I entirely concur in the opinion of my brother WILLIAMS, that it is ; and that it is a matter on which there really can be no question at all.

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The next question is, whether the thirteen trustees in whose names this ejectment is brought, were really the trustees. If they were not, then the proceedings to remove the master were irregular. Unless there were two-thirds of the existing trustees present at the meeting, and two-thirds of that two-thirds concurred in the vote of removal on two occasions, their proceedings would amount to nothing. If it becomes essential that two-thirds of the seventeen trustees should upon two occasions have concurred in the *vote, if there were seventeen persons not correctly appointed trustees, there would have been two objections : first, that the removal was improper ; and secondly, there would be a question as to the *quantum* for which the verdict was to stand. I am clearly of opinion, that upon this evidence those seventeen trustees were correctly appointed. By the Municipal Corporation Act, power is given to the Lord Chancellor in the meantime, until an Act should be passed to enable him, to make such directions as he should think fit for the administration and management of the trust fund, and to appoint trustees for that purpose. Then the private Act, which was introduced for the purpose of settling disputes in the school, vests all the property of the school in the trustees ; and the effect of the interpretation clause is to vest it in the trustees from time to time duly appointed by the CHANCELLOR, without the intervention of any conveyance. Then the case is reduced to the determination of the question, whether or not the seventeen trustees mentioned in the declaration have been duly appointed by the CHANCELLOR. There is certainly some informality in the proceeding on the part of the CHANCELLOR, but his meaning is perfectly clear. A reference was made by the Court to Master Brougham, not to appoint, but to inquire who were proper persons to be appointed, in the place of eight of these persons. A certain reason was suggested for the

CHANCELLOR'S consideration as a good cause for removing the trustees. Undoubtedly the removal is within the discretion of the CHANCELLOR. Master Brougham inquires into the fact upon evidence brought before him, and he reports that it is proper to appoint eight trustees in lieu of that number, who are dead or have quitted the borough. That recommendation amounts to nothing, unless it is confirmed by the CHANCELLOR. When the matter comes before the Chancellor, instead of making an order expressing the fact upon which the eight trustees have become disqualified, and *expressly appointing new trustees in their place, he merely confirms the Master's report. But if you look at the order confirming the report, no one can doubt that the effect of it is to appoint those persons trustees in lieu of others; and that, consequently, it would be in itself both a removal of the former trustees and the appointment of new ones. That appears not merely by the terms of the order confirming the report, and which directs that effect shall be given to the report, but by the latter part of the order, which states, that those persons therein named are to pay the costs of the petition out of the charity funds, clearly showing that the charity funds were meant by him to be vested in those trustees; and, therefore, I think in this case, that although the proceeding may be informal, there is no doubt that substantially the CHANCELLOR has given an opinion upon it, and has appointed those seventeen persons trustees. By the effect of the private Act, all the estates were vested in them. All their proceedings are regular.

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ALDERSON, B. :

I am of the same opinion. It seems to me clear, according to the scheme approved of by the Master, that the trustees have generally absolute discretion to interfere. I suppose it was thought that, upon the whole, it would be more convenient that the trustees should possess an unlimited discretion, than that a party should have it in his power to perplex them by perpetually requiring strict proof. Therefore, in a choice of evils, they probably chose what they considered the less. It is sufficient for us to say, that there is that discretion; and the trustees having exercised it, in point of law the defendant is legally removed. Then the question is, are these the proper trustees to exercise that discretion? That depends on whether the CHANCELLOR'S order for their appointment is sufficient. It seems to me that the appointment of the

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trustees would have been in a better form, if the CHANCELLOR had adopted the simple mode of saying, "I hereby appoint so *and so." Probably the reason that has not been done was, that at the time these forms were first adopted, they were consummated by the execution of a deed, and consequently at that time the form was perfectly appropriate. When the necessity for the deed was removed, the form might have been altered to advantage. The meaning, however, of the LORD CHANCELLOR's order is perfectly clear, for in effect he says, "I approve of the Master's report, by which the Master says these are fit people to be appointed; and I direct the trustees, including by name these people as trustees, out of the trust funds to pay a certain sum of money." No one can doubt, that under these circumstances the LORD CHANCELLOR has appointed them trustees, for he has ordered them to act as such.

Rule refused (1).

1850.
June 22.
Dec. 16.

BROOKES v. TICHBORNE.

(5 Ex. 929—931; S. C. 20 L. J. Ex. 69; 14 Jur. 1122.)

[929]

In an action of libel, charging the plaintiff with having in a letter published a libel upon the defendant, to which the defendant pleads that the plaintiff did in fact publish the libel in question; letters, not otherwise evidence in the cause, written by the plaintiff, and in which the defendant's name was spelt in a peculiar manner, were held admissible as evidence that the libel in question, which contained the defendant's name spelt with the same peculiarity, was written by the plaintiff.

CASE for libel. The declaration charged the defendant with having been guilty of publishing a libel, which charged the plaintiff with having published a libel on the defendant. Plea in justification, that the plaintiff had written the libel imputed to the defendant. *De injuriâ*, and issue thereon.

At the trial, before Patteson, J., at the last Stafford Spring Assizes, the defendant's counsel, in support of the plea, and to show that a letter which contained the alleged libel upon the defendant was written by the plaintiff, relied upon the fact that, upon several occasions, the plaintiff had been in the habit of misspelling the defendant's name, by improperly adding a second *t*, and by spelling it Titchborne instead of Tichborne; and for this purpose the defendant's counsel offered in evidence several letters,

(1) But see *Willis v. Childe*, 13 Beav. 117, Jan. 14, 1851, where Lord LANGDALE, M. R., granted an injunction to restrain the trustees from

removing the plaintiff, being of opinion that the 14th regulation did not confer such arbitrary power upon them.

which he proved to have been written by the plaintiff, but which were not in evidence in the cause, in order to show this peculiarity. This evidence was objected to on the part of the plaintiff, and was rejected by the learned Judge, who was of opinion that it was not admissible. The plaintiff having obtained a verdict, with 1*s.* damages,

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Allen, Serjt. obtained a rule *nisi* for a new trial, on the ground that these letters were improperly rejected.

In Trinity vacation last, (June 22),

Keating and *Gray* showed cause, and contended that the letters were not admissible in evidence, upon the same principle as comparison of handwriting, under such circumstances, is not admissible; that the proper mode of proving the peculiarity of spelling, which the plaintiff had been in the habit of adopting, was by the testimony of some witness who was cognisant of that fact. That a peculiar *mode of spelling a person's name was precisely analogous to a peculiar form of handwriting; and therefore, that the admission of such evidence would have the effect of improperly making all documents alleged to be written by the party evidence in the cause. And they cited *Hughes v. Rogers* (1) *Griffits v. Ivory* (2), and *Doe d. Perrey v. Newton* (3), in support of these propositions.

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Allen, Serjt., in support of the rule, urged the admissibility of the letters, on the ground of their relevancy, and of its being one mode of proof of a fact, the propriety of the admission of that fact not being denied on the part of the plaintiff.

The COURT, consisting of PARKE, B., and ALDERSON, B., stated that they were clearly of opinion that the letters ought to have been received in evidence; but, as the ground of their decision involved a matter of some nicety, they would give a written judgment upon the question.

Cur. adv. vult.

The judgment of the COURT was now delivered by

PARKE, B.:

The question in this case, which was argued before us after Trinity Term last, was, whether my brother PATTESON was right in the rejection of evidence offered on the part of the defendant.

(1) 8 M. & W. 123.

(3) 5 Ad. & El. 514.

(2) 11 Ad. & El. 322.

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It was an action for a libel, charging the plaintiff with having written a libel on the defendant. The defendant pleaded in justification, that the plaintiff had written the libel. In the libel alleged to have been so written, the defendant's name was spelt with two t's, Titchborne, and not Tichborne. In order to show that the plaintiff wrote that libel, my brother *Allen* proposed to show that such was the mode in which the plaintiff spelt the defendant's name *on other occasions; and for that purpose offered in evidence one or more letters, which he proposed to prove to have been written by the plaintiff, in which the name of the defendant was so spelt. *Mr. Keating*, on behalf of the plaintiff, objected to the admission of those letters, and my brother *PATTERSON* rejected them; and on that ground a rule *nisi* for a new trial was granted.

On showing cause it was hardly disputed, that, if a habit of the plaintiff so to spell the word was proved, it was some evidence against the plaintiff to show that he wrote the libel. Indeed, we think that proposition cannot be disputed, the value of such evidence depending on the degree of peculiarity in the mode of spelling, and the number of occasions in which the plaintiff had used it. But it was objected, that the mode of proof of that habit was improper, and that the habit should be proved, as the character of handwriting is, not by producing one or more specimens and comparing them, but by some witness who is acquainted with it from having seen the party write, or corresponded with him. But we think this is not like the case of the general style and character of handwriting. The object is not to show similarity of the form of the letters and mode of writing of a particular word or words, but to prove a peculiar mode of spelling a word, which might be evidenced by the plaintiff having orally spelt it in a different way, or written it in that way once or oftener in any sort of characters, the more frequently the greater the value of the evidence. For that purpose, one or more specimens written by him with that peculiar orthography would be admissible.

We are of opinion, therefore, that this evidence ought to have been received, and, not having been received, the rule for a new trial must be absolute.

Rule absolute.

TURNER v. CAMERON'S COALBROOK STEAM COAL COMPANY (1).

(5 Ex. 932—938 ; S. C. 20 L. J. Ex. 71.)

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Dec. 3, 16.

[932]

Trespass will not lie against the occupier of land at the suit of the mortgagee, who has never been in actual possession or been seised of the land, and has not obtained a judgment in ejectment, either by default or by verdict; and therefore he cannot, in such case, waive the tort, and maintain an action of use and occupation.

DEBT for use and occupation. Plea, never indebted, and issue thereon.

At the trial, before Williams, J., at the last Spring Assizes for the county of Glamorgan, it appeared that the action was brought to recover the sum of 20*l.* for two years' rent, for a field called the Mill Field, and the further sum of 120*l.* for four years' rent for some other land adjoining the above, upon which the defendants had placed a line of railway. The rent was claimed as due up to Michaelmas, 1849. It appeared that, in the year 1840, the whole of the land had been mortgaged by the then owner, Colonel Cameron, to the plaintiff. In the year 1845, the defendants had entered into possession of that portion of the land on which the railway was; and in 1847 they erected some buildings upon the Mill Field; and they had been in the occupation of the whole of the premises up to the time of the commencement of this action. On the 12th of October, 1848, the defendants were served with a notice by the plaintiff, to pay him the rent then due, and that also which might afterwards become due in respect of the portion called the Mill Field. Subsequent to this notice, much correspondence with reference to the whole of the premises passed between the parties. The present action was commenced upon the 30th of November, 1849. The learned Judge directed the jury, that, under the circumstances of the case, the plaintiff was in point of law in a position to waive the trespass in respect of the occupation of the land by the defendants, and to maintain this action for the use and occupation of all the premises; but, entertaining some doubt whether there was evidence to entitle the plaintiff to succeed as to the whole of the land, or even as to the Mill Field, he reserved leave to the defendants to move to enter a nonsuit, or to reduce the verdict to the *sum of 10*l.*, being one year's rent for the Mill Field. A verdict having been found for the plaintiff with respect to the whole land,

[*933]

(1) See *Phillips v. Homfray* (1883) *Wallis v. Hands* [1893] 2 Ch. 75, 62 24 Ch. D. 439, 52 L. J. Ch. 833; L. J. Ch. 586.—J. G. P.

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Benson, in last Term, moved for a rule *nisi*, in pursuance of the leave reserved, to enter a nonsuit or to reduce the damages. The COURT refused so much of the rule as related to the entry of a nonsuit, being of opinion that there was sufficient evidence to entitle the plaintiff to recover the year's rent for the Mill Field, but granted a rule *nisi* to reduce the damages.

In the present sittings, (December 3),

Davison and Grove showed cause :

The plaintiff is entitled to maintain this action for the recovery of the rent due to him by the defendants, by reason of their occupation of that portion of the land upon which the railway was placed.

(PARKE, B. : Show us in the first place that Colonel Cameron was in a position to recover rent from the defendants before the notice of mortgage was given to the defendants.)

It was here contended that the evidence supported such a contract between Colonel Cameron and the defendants. Upon the notice being given, the defendants became liable to the rent of the premises they had occupied. They were mere trespassers,—the plaintiff was legally entitled both to the land and to the rent. His title was not disputed. *Evans v. Elliott* (1) will no doubt be relied upon by the defendants; but that case is not consistent with several authorities upon this question. In *Pope v. Biggs* (2) it was held that a mortgagee, upon giving notice to the tenant holding the mortgaged premises under a lease granted by the mortgagor after the mortgage, is entitled to receive from those tenants the rents actually due at the time of the notice, as well as those which accrued due afterwards. BAYLEY, J., *there says, "I have no doubt that, in point of law, a tenant who comes into possession under a demise from a mortgagor, after a mortgage executed by him, may consider the mortgagor his landlord so long as the mortgagee allows the mortgagor to continue in possession and receive the rents; and that payment of the rents by the tenant to the mortgagor, without any notice of the mortgage, is a valid payment. But the mortgagee, by giving notice of the mortgage to the tenant, may thereby make him his tenant, and entitle himself to receive the rents."

[*934]

(PARKE, B. : I do not think that the case itself supports your

(1) 48 R. R. 520 (9 Ad. & El. 342).

(2) 32 R. R. 665 (9 B. & C. 245).

position, although the *dictum* of Mr. Justice BAYLEY is in your favour. But that is all, for the case merely decides, and no doubt correctly, that the tenant, upon an eviction by title paramount, is entitled to dispute the mortgagor's title to the land.)

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Lumley v. Hodgson (1) decided that an action for use and occupation is maintainable by the mortgagee for rent due after notice given to the tenant, without attornment; and it would seem that the effect of such notice is the same as to the by-gone rent as it is as to the after-accruing rent. *Birch v. Wright* (2) is also in the plaintiff's favour.

(MARTIN, B.: *Standen v. Christmas* (3) is against you; for in one of the points made in that case, which appears to have involved a similar question, the Court of Queen's Bench seem to rest the action for use and occupation upon a contract between the parties, the count for use and occupation stating, as the Court there say, that the defendant occupied by the sufferance and permission of the plaintiff.)

So here, as the owner could have ejected the defendants but did not do so, they held the land by his permission. The notice determines the mortgagor's right, and entitles the mortgagee to the rent: *Waddilove v. Barnett* (4).

(MARTIN, B.: So that, if the tenant had held the premises at a peppercorn *rent, the mortgagee might say, "pay me the real value of the land.")

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In *The Mayor, &c. of Newport v. Saunders* (5), it was held that *assumpsit* may be maintained by the owner of a market for stallage, without showing any contract in fact between him and the occupier of the stall.

(MARTIN, B.: I have good reasons for knowing that the case was not very strongly pressed upon the Court, and that the question in dispute would not have been set at rest by that decision, if the parties had felt it their interest to have the matter discussed in a higher Court.)

(1) 14 R. R. 315 (16 East, 99).

(4) 2 Bing. N. C. 538; 2 Scott, 763.

(2) 1 R. R. 223 (1 T. R. 378).

(5) 37 R. R. 456 (3 B. & Ad. 411).

(3) 74 R. R. 224 (10 Q. B. 135).

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They also referred to *Moss v. Gallimore* (1), *Johnson v. Jones* (2), *Hull v. Vaughan* (3), *Gibson v. Kirk* (4), *Doe d. Higginbotham v. Barton* (5), *Kirtland v. Pounsett* (6), *Partington v. Woodcock* (7), *Foster v. Stewart* (8), and to the notes to *Moss v. Gallimore* (9); and PARKE, B., referred to *Burrowes v. Gradin* (10), and *Howard v. Shaw* (11).

Benson in support of the rule :

Even upon the assumption that the mortgagor could have maintained an action for use and occupation against the defendants, that contract has not been transferred to the plaintiff. All the authorities show that, in order to make the tenant liable to the mortgagee for either by-gone or after-accruing rent, there must be a contract between the parties, by which the tenant undertakes to pay the mortgagee the rent. It has been said that the mortgagee may waive the tort and sue upon the contract; but in order to sustain the action a contract must be established. Thus the count for use and occupation always states that the defendant held the premises by the permission and sufferance of the plaintiff. *This allegation is a material one, and is put in issue by the plea which denies the contract: *Waddilove v. Barnett*. That case indeed shows that there is a new contract, which dates from the time the notice is given. The mortgagor is not the mortgagee's agent for the purpose of making the contract. If such a contract were to be implied, the mortgagee, after remaining silent for several years, might unexpectedly give the occupier of the land notice to pay him all arrears. To hold the tenant liable upon such terms, would be to fix a contract upon parties between whom there is no privity whatever. The cases of *Evans v. Elliott*, and *Browne v. Storey* (12), are express authorities that the mere notice is not sufficient, but that a distinct contract must be shown to exist between the occupier of the land and the mortgagee.

Cur. adv. vult.

PARKE, B., now said :

This was an action which was brought by the mortgagee for use

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| (1) Doug. 279. | (8) 15 R. R. 459 (3 M. & S. 191). |
| (2) 48 R. R. 714 (9 Ad. & El. 809). | (9) 1 Smith, L. C. 310. |
| (3) 6 Price, 157. | (10) 67 R. R. 853 (1 Dowl. & L. 213). |
| (4) 1 Q. B. 858. | (11) 58 R. R. 641 (8 M. & W. 118). |
| (5) 52 R. R. 354 (11 Ad. & El. 307). | (12) 1 Man. & G. 117. |
| (6) 2 Taunt. 145. | |
| (7) 45 R. R. 692 (6 Ad. & El. 690). | |

and occupation, against a Company which had been established by the defendants, and which was, I believe, a corporate body. The action was for the use and occupation of one part of the land which was occupied by the railroad, and for another part which is called the Mill Field. The cause was tried before my brother Williams, when a verdict was found for the plaintiff; but the learned Judge, doubting whether there was sufficient evidence to go to the jury with respect to the whole or any part, reserved leave to the defendants' counsel to move either to enter a nonsuit, or to reduce the damages, as the Court should be of opinion that there was no evidence to sustain the action either as to the whole or a portion of the premises. The Court was of opinion, on the motion for a rule to show cause, that there was ample evidence to sustain it with respect to that part called the Mill Field; but doubting as to the remainder, they granted a rule to show *cause as to the reduction of the damages only. On showing cause, it appeared that there was some evidence to go to the jury of the defendants having occupied this part of the land by permission of the plaintiff. Colonel Cameron was the proprietor of the property, and mortgaged it to the plaintiff Turner. After the mortgage, the Cameron's Company was established, and by some agreement or understanding with him, or in what other way does not appear by the evidence, the Coal Company occupied the land by laying their rails upon it. It appears that afterwards, when they were called upon for compensation, there was a negotiation between the plaintiff and the defendants for the payment of compensation for the whole. That is evidence to go to the jury, that the defendants had held the land upon the terms that they were to pay for it to the mortgagee, but it was not more than evidence to go to the jury; and if my brother Williams had left that question to the jury, there would have been no ground to disturb the verdict. But it appears, on the admission of the learned counsel on both sides, that, in leaving the case to the jury, my brother WILLIAMS told them, that the plaintiff was in a condition to, and by law might, waive the action of trespass, which he was entitled to bring for the occupation of the land by the Railway Company, and to bring an action for use and occupation instead. That, I think, upon the cases may be considered to be a doubtful question. Supposing the plaintiff to be simply in the situation of a person in possession, and the defendants to have trespassed on the land, and to have occupied that land to his exclusion for some time, whether that would have been a ground to

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recover for use and occupation, on the principle that the plaintiff might waive the trespass and recover in assumpsit, is a matter which may be treated as somewhat doubtful. But in this case, we are all clearly of opinion, that the plaintiff was not in a condition to bring an action of trespass, inasmuch as he was mortgagee out of *possession; he never had entered upon the property at the time of the trespass committed, and never was in actual possession. He could only have maintained one in case he had brought an ejectment, and laid the demise at an antecedent period, and the defendants had either suffered judgment by default as tenants in possession, or there had been a verdict on the trial, and then the defendants would have been in the condition of admitting the lease, and consequent entry to make the lease, and therefore the plaintiff would have been in possession, by the fiction in ejectment, from the time of the demise. But here no ejectment has been brought, and consequently the plaintiff never was in a situation to maintain an action of trespass at all. We therefore think my brother WILLIAMS was wrong in telling the jury, that the plaintiff might waive the trespass and recover the rent in an action for use and occupation. The result is, that there will be a new trial, unless the plaintiff consents that this rule be made absolute; in which case he will be entitled to recover for the use and occupation of the Mill Field only, but not for the remainder.

Rule absolute accordingly.

1850.
Dec. 4.

[939]

LITCHFIELD v. READY.

(5 Ex. 939—947; S. C. 20 L. J. Ex. 51.)

A mortgagee out of possession, who gives notice of the mortgage to the tenant who has occupied since the mortgage, cannot maintain trespass for mesne profits against the tenant for the rents accrued due since the date of the mortgage, by mere entry upon the land after the notice. The doctrine of relation applies only as between disseisor and disseisee (1), in which case the re-entry has relation back to prior occupation by the owner, and remits him to his original rights.

Where the mortgagee gave notice of the mortgage to the tenant in possession, who had become tenant since the mortgage, and made an entry, and subsequently served a notice of ejectment upon the tenant, who gave a Judge's order, by which it was agreed that the action should be stayed upon the tenant's undertaking to give up possession of the premises on a day named therein; and, in default thereof, the mortgagee was to be at liberty to sign final judgment, and to issue execution against the tenant for the whole costs of the action: Held, first, that the mortgagee was not in a condition to maintain an action of trespass to recover the mesne profits

(1) See *Barnett v. Guilford*, 11 Ex. 19.—J. G. P.

from the date of the mortgage, inasmuch as he never had such a possession as is necessary to support the action ; and, secondly, that the Judge's order could not be considered as equivalent to a judgment by default in ejectment, or as any evidence of the mortgagee's prior occupation of the premises.

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TRESPASS for mesne profits from the 25th of November, 1848, to the 15th of November, 1849. The defendant pleaded, first, Not guilty; and, secondly, that the messuage in which &c. was not the messuage of the plaintiff. Upon these pleas issues were joined. At the trial, before Alderson, B., at the Middlesex sittings in last Easter Term, it appeared that, on the 24th of November, 1846, the premises in question were mortgaged in fee by one Sharpe to the plaintiff; and that in September, 1848, Sharpe let them to the defendant. In September, 1849, the plaintiff gave notice of the mortgage to the defendant, at the same time requiring payment of the rent. On the 27th of October, 1849, a declaration in ejectment, at the suit of the plaintiff, was served upon the defendant; and on the 31st of the same month the defendant gave the following Judge's order :

“ *Doe on the Demise of C. Litchfield, Plaintiff, against Richard Roe, Defendant ; Henry Ready, Tenant.*

“ Upon reading the consent of the attorney of the lessor of the plaintiff, and of Henry Ready, the tenant in possession, I do order that all further proceedings in this action be stayed until the 15th of November next, the tenant in possession hereby undertaking on that day to give up possession of the premises in the declaration of *ejectment mentioned to the lessor of the plaintiff on his assent; and that, on default, the lessor of the plaintiff shall be at liberty to sign final judgment, and to issue execution against the said Henry Ready for the amount of the costs of such judgment, execution, writ of possession, sheriff's poundage, officers' fees, and all other incidental expenses.

[*940]

“ Dated the 31st of October, 1849.”

On the 15th of November the defendant gave up possession of the premises to the plaintiff, who entered upon them.

Upon these facts the defendant's counsel contended, that the action would not lie. A verdict was thereupon entered for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit.

Aspland having obtained a rule *nisi* accordingly,

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The plaintiff is entitled to retain the verdict, if he succeeds in establishing either one of the two following propositions; namely, either, first, that the entry, which took place upon the 15th of November, 1849, related back to the time when the plaintiff's title to the property accrued, and so vested the possession in him at the earlier period; or, secondly, if the plaintiff show that the Judge's order obtained by the defendant is evidence that he has admitted the plaintiff's title and possession, and consequently that it has an effect of a similar character to that of a judgment by default in an action of ejectment. With respect to the first point, it is submitted that a mortgagor, who continues in possession of the premises after a mortgage in fee to the mortgagee, is the mere agent or bailiff of the latter.

(PARKE, B. : You will have to contend, that the mortgagee can maintain an action of trespass in all cases where he could bring ejectment.)

[*941] It *would seem so. In former times the action of ejectment was in fact an action for damages, and the measure of the damages was, the profits of the land accruing during the time the defendant had held the land. The effect of the action of ejectment is merely to connect the owner of the land with the possession. The entry, by the doctrine of relation, vests the possession. [He cited Buller's Nisi Prius, 87 a and *Tharpe v. Stallwood* (1). Here] the defendant is a mere wrong doer, who enjoys the possession of the land after the mortgage, either as tenant to or by the sufferance and permission of the mortgagee.

[942]

(PARKE, B. : The question as to the effect of a judgment in ejectment was much discussed in the case of *Doe v. Wright* (2), where the several authorities upon the subject are collected.)

The same point also came before this Court in *Doe v. Wellsman* (3). The mortgagor in truth is the mere bailiff of the mortgagee to receive the rent.

(PARKE, B. : If you can establish that proposition, your argument may be successful.)

(1) 63 R. R. 474 (5 Man. & G. 760).

(3) 2 Ex. 368.

(2) 50 R. R. 534 (10 Ad. & El. 763).

This very point arose in *Keech v. Hall* (1), where it was decided that a mortgagee might recover in ejectment, without a previous notice to quit, against a tenant claiming under a lease from the mortgagor granted after the mortgage without the privity of the mortgagor. When it was there asked by the defendant's counsel whether such mortgagee might also maintain an action against the tenant for mesne profits, which would be a manifest hardship and injustice to the mortgagor as he would then pay the rent twice. Lord MANSFIELD, Chief Justice, gave no opinion on the point, but said, there might be a distinction between the mortgagor and the mortgagee; the mortgagor might be considered as receiving the rent in order to pay the interest, by an implied authority from the mortgagor until he determined his will.

(PARKE, B. : I think the authorities are against your proposition in *Wheeler v. Montefiore* (2) may seem to be so, but that proceeds upon the ground that a lessee before entry cannot maintain trespass, and the doctrine of relation by entry was not discussed, for there was no entry. Here the plaintiff is mortgagee in fee, and has entered.

(PARKE, B. : The doctrine of relation applies only to the case of a disseisor and disseisee. See Com. Dig. Trespass (B. 3), Cro. Jac. 604, *Perry v. Bowes* (3).)

In a note to *Butcher v. Butcher* (4), which may be quoted to show what was the general opinion as to the law upon this point at that time, it is said, "Ejectment is founded upon a right to enter the land, make the demise to the nominal lessee; whoever therefor enters to maintain ejectment, may enter peaceably without action, and such entry the legal possession vests, with relation to the period at which the title of the party accrued, so that he may now sue for mesne trespasses; which brings the right of possession and the legal possession into fullness of the entry directly in question."

In the second place, the Judge's order which the defendant obtained, given is, in effect, equivalent to a judgment by default in an action of ejectment, which is evidence of the plaintiff's title and possession from the date of the demise laid in the declaration in the ejectment brought to recover the possession of these premises: *A. Parkin* (5). This order is as much evidence of the plaintiff's

(1) Doug. 21.

(2) 57 R. R. 614 (2 Q. B. 133).

(3) Vent. 361.

(4) 31 R. R. 237 (1 Man. & Ry. 221).

(5) 2 Burr. 665.

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and of his right of entry, by the confession of the defendant, as is a judgment in ejectment, unless there be some magic in *the mere fact of signing judgment. In *Hunter v. Britts* (1), Lord ELLENBOROUGH, Ch. J., thought, that the judgment in ejectment was not evidence of title against the defendant without notice of the ejectment; but that his subsequent promise amounted to an admission, that the plaintiff was entitled to the possession of the premises, and that he himself was a trespasser. *Calvert v. Horsfall* (2), is also to the same effect.

Aspland, *contra*, was not called upon.

PARKE, B. :

I am of opinion that the rule ought to be absolute. There are two questions submitted for our consideration in this case. The first is, whether the plaintiff, who is the mortgagee of the premises in question, but who was not in actual possession until the 15th of November, 1849, can maintain an action of trespass for mesne profits antecedent to that date. And the second question is, whether the Judge's order given by the defendant amounts to an agreement on his part to put himself in the situation of one against whom judgment in ejectment has been recovered. As to the first point, the question is, whether the entry by the plaintiff at the later date creates a prior possession, by relation back to the date of the mortgage deed, the plaintiff not having been in actual possession at that time. The general doctrine is, that where a man is disseised and re-enters, such re-entry refers to and has relation back to the time of his first entry, and he may bring an action of mesne profits, and recover them from the date of the prior entry; for there he was in actual possession at the time the trespass was committed. But that rule applies only to cases of disseisin, as appears by the books; and the several authorities upon the subject are to be found collected in 2 Roll. Abr. tit. "Trespass per Relation," p. 554, and those are all cases of that description. Indeed, *it is common learning, that an action of trespass cannot be maintained without an actual possession by entry on the land. And the better opinion seems to be, that on a conveyance under the Statute of Uses, the party to whom the land is conveyed has no right to bring an action of trespass until after entry. In the present case, there is no relation back to the title of the mortgagee. In an action for mesne profits

[*945]

(1) 14 R. R. 807 (3 Camp. 455).

(2) 4 Esp. 167.

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it is said that the record of a judgment in ejectment is conclusive evidence of the plaintiff's title, unless he waives his right of replying it by way of estoppel, when he has an opportunity of placing it on the record, but fails to do so. This matter was much discussed in *Doe v. Wellsman*, where the estoppel was replied; but in *Armstrong v. Norton* (1), decided in the Court of Exchequer in Ireland, the estoppel was not replied. The Court there held, that the judgment was not more than *prima facie* evidence of the plaintiff's title; but as the New Rules have not been introduced into those Courts, the defendant is at liberty to enter fully into his defence under the general traverse of Not guilty, and the matter is at large, and the plaintiff has no opportunity of replying the estoppel. In *Doe v. Huddart* (2), it was held, that as the defendant afforded the plaintiff an opportunity of relying on the estoppel by way of replication, of which he did not avail himself, the evidence was not conclusive. The rule is thus laid down in *Treviban v. Lawrence* (3): "Where the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel; for here is a title in the plaintiff that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel, for then they are to find the truth *of the fact, which is against him." The cases show, that the record in ejectment is evidence of the plaintiff's possession of the premises at the time of the demise, and therefore that, on the production of the record, the plaintiff may become entitled to recover mesne profits subsequent to the date of the demise in the declaration in ejectment. But it appears from the authorities, that if the plaintiff seeks to recover mesne profits antecedently to the day of the demise in the declaration in ejectment, he must go further, and is bound to prove such a title, accompanied by possession, as would enable him to maintain an ordinary action of trespass. The learned counsel has relied upon two passages which he has cited from the case of *Tharpe v. Stallwood*, in which he states that my late lamented brother COLTMAN expressed an opinion which favours his argument in support of the doctrine of relation. No one can entertain a higher respect for the opinion of that learned Judge than I do; but I do not think the passages referred to lead to the

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(1) 2 Ir. L. R. 96.

(3) 2 Ld. Ray. 1048; 1 Salk. 276.

(2) 2 Cr. M. & R. 316.

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inference sought to be deduced from them. It appears to me, that he did not intend to say that the entry made the party a trespasser by relation in all cases to the time when the owner's title accrued, but only in the case of disseisor and disseisee, where the disseisee by the subsequent entry is remitted to his original rights, and is to be considered as having been in actual possession at the time he was put out, so as not only to give him a good title and right of entry, but such a title as is sufficient to maintain the action of trespass to recover damages for the time he had been ousted. In the present case, therefore, the plaintiff, in order to succeed, is bound to establish a title accompanied by the possession of the property with respect to which the action is brought. Here the mortgagee never was in possession until the 15th of November, 1849; and I therefore think that, upon this state of facts, irrespective of the order which the plaintiff has obtained from the defendant, he is not in a *position to maintain an action of trespass for mesne profits prior to that date.

[*947]

The other question in the case is, whether the agreement by the Judge's order has the same effect as a recovery by judgment in ejectment. It is in effect totally different; the only matter in dispute at the time being, whether the defendant was to give up possession of the premises without being liable to the costs of signing judgment in ejectment and of the execution. There is no plea of accord and satisfaction, and therefore it is not necessary to give any opinion upon the effect of the agreement as an answer to the action; for the only issue upon which the present question depends is that which is a denial that the close in which the trespass was committed was at that time the close of the plaintiff. Now the meaning of this plea has been settled by the case of *Jones v. Chapman* (1). Here the plaintiff's title to the property is not disputed, the only question being whether he had such a possession of the property at the time as is sufficient to maintain this action; and I am of opinion that the bare fact that he is the mortgagee, to which the case is now reduced, is not of itself sufficient.

ALDERSON, B., PLATT, B., and MARTIN, B., concurred.

Rule absolute.

(1) 76 R. R. 794 (2 Ex. 803).

MILNES *v.* DAWSON.

(5 Ex. 948—951 ; S. C. 20 L. J. Ex. 81.)

1850.
Dec. 5.

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To an action by the indorsee against the acceptor of a bill of exchange, the defendant pleaded, that the drawer indorsed the bill to the plaintiff without value or consideration, and that the plaintiff always held the same without value or consideration ; and that, after the bill became due, the drawer accepted certain scrip certificates from the defendant, in full satisfaction and discharge of the bill. Replication, that the bill was indorsed for a good and sufficient consideration. Issue thereon : Held, after verdict, that the plea was bad, and that the plaintiff was entitled to judgment *non obstante veredicto*.

ASSUMPSIT on a bill of exchange for 45*l.* 19*s.*, payable three months after date, drawn by one James Hanson upon and accepted by the defendant, and indorsed by Hanson to the plaintiff. The fifth plea stated, that there never was any value or consideration whatever for the indorsement of the bill by the said J. Hanson to the plaintiff, and that the plaintiff took and received and hath always held the same without any value or consideration for the same ; and that after the bill became due and payable according to the tenor thereof, and before the commencement of the suit, the said J. Hanson, with the assent and concurrence of the defendant, took and appropriated certain scrip certificates and certificates of shares, of and belonging to the defendant, in divers Railway Companies and of great value, to wit, of a value far exceeding the amount of the said bill and of all interest thereon, and of all damages by reason of the non-payment thereof, and which certificates had been before then deposited with him the said J. Hanson as a security for the payment of the money secured and made payable by the said bill, in full satisfaction and discharge of the said bill, interest, and damages. Verification. Replication, that the said bill was indorsed by the said J. Hanson to the plaintiff, as in the declaration mentioned, for a good and sufficient consideration, to wit, to the full amount of the said bill ; concluding to the country : upon which issue was joined. There was another plea, which raised a similar issue.

At the trial, before Parke, B., at the London sittings in last Trinity Term, the issues raised by the three first pleas were found in favour of the plaintiff, and the jury were discharged as to the fourth ; but the issues raised by the fifth and last [pleas] were found for the defendant.

J. Brown, in Michaelmas Term, obtained a rule *nisi* to *enter judgment *non obstante veredicto* upon the fifth and last pleas.

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Hoggins showed cause :

The plea is a good answer to the action after verdict. The plaintiff never having given any value or consideration for the bill, and it being overdue, the executed agreement between Hanson and the defendant precludes the plaintiff from recovering the amount of the bill from the defendant.

(PARKE, B.: Hanson transfers the bill to the plaintiff, who thereupon becomes the holder, and the right to sue upon it is vested in him. It does not appear that the bill was indorsed after it became due. That being so, what possible right can Hanson have to receive the amount of the bill?)

In point of law, the plaintiff was the mere agent of Hanson to receive the money; a settlement therefore with Hanson is a discharge of the bill. In case the plaintiff had received the amount of the bill, it would have been his duty to account for it with Hanson, who could have enforced such right against him by an action for money had and received, or perhaps by treating it as a loan.

(PARKE, B.: Suppose the bill was given to the plaintiff; the only issue is, whether the plaintiff gave a good and valuable consideration for it. Suppose the plea had alleged that the bill was handed over to the plaintiff as trustee, would it have been a good plea?)

ALDERSON, B.: The argument in truth proceeds upon the assumption that the bill never was transferred to the plaintiff.)

It is submitted that the plaintiff was merely Hanson's agent, and had only a naked authority from him to sue upon the bill with that object.

J. Brown, contra, was not called upon.

PARKE, B.:

I am of opinion that this rule ought to be absolute. The fifth and last pleas, which are in substance the same, state, that Hanson indorsed the bill to the plaintiff *without any consideration or value, and that the plaintiff never gave any consideration or value for it; and that after it became due Hanson and the defendant entered into an agreement, by which the former accepted certain scrip in discharge and satisfaction of the bill. It would be altogether inconsistent with the negotiability of these instruments,

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to hold, that after the indorser has transferred the property in the instrument, he may, by receiving the amount of it, affect the right of his indorsee. When the property in the bill is passed, the right to sue upon the bill follows also. The question, whether Hanson could sue the plaintiff, we are not now called upon to determine. If it had been averred that the plaintiff held the bill as his agent, I should not have much difficulty in saying that the action would lie. A bill of exchange is a chattel, and the gift is complete by delivery coupled with the intention to give. If the question as to the rights between donor and donee were now discussed, with reference to the state of the law on the subject as it stood towards the close of the last century, we might hold otherwise than we now do. It has been said, that the donee of a bill of exchange cannot sue the donor upon it, as the donor may well allege that the donee did not give any consideration for it. See *Holliday v. Atkinson* (1), and Mr. Chitty's work on Bills of Exchange, where the cases are to be found collected at page 74. And therefore it may be said, that if this bill was a gift from Hanson, the plaintiff could not have sued him upon it; but still Hanson transferred all his rights to the plaintiff; and how, therefore, can it be contended that a payment to the donor is to be taken as a satisfaction of a bill in the hands of the donee? The learned counsel contends, that it is to be presumed that the indorsement took place after the bill had become due and payable. But we are not at liberty to draw any such inference; and it is perfectly consistent with everything that is stated in this plea, that *the full title in the bill was transferred to the plaintiff. If the plea had alleged that the plaintiff held the bill as Hanson's agent, merely for the purpose of receiving the money for him, then a payment to either party would have been a good discharge of the party liable upon the bill, and the plea would have been good; but in truth the plea does not contain any such averment, and consequently it cannot be sustained.

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ALDERSON, B.:

I am of the same opinion. It is not necessary to say whether Hanson could maintain an action for the recovery of this amount from the plaintiff. But by the indorsement he has transferred to the plaintiff all the rights which, before the indorsement, he had of suing upon the bill. If therefore he has parted with all his rights, and that of suing on the bill, and the plaintiff has them, how is it

PLATT, B., and MARTIN, B., concurred.

Rule absolute.

1850.

Dec. 6.

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PELL *v.* DAUBENY.

(5 Ex. 955—959; S. C. 20 L. J. Ex. 44.)

A witness who, in obedience to a *subpœna*, attends a trial in a civil action, may, without any express contract, maintain an action for his expenses against the party who subpœnaed him, the fact of his attendance being evidence from which the jury may infer a contract.

DEBT for work and labour, journeys, and attendances by the plaintiff as a witness, and for money paid. Plea, never indebted. Issue thereon.

At the trial, before Platt, B., at the Northamptonshire Summer Assizes, it appeared that the action was brought to recover the sum of 46*l.* 14*s.*, for the attendance, journeys, and expenses incurred by the plaintiff in attending the trial of a cause at Westminster, under a *subpœna duces tecum* on behalf of the present defendant, the then plaintiff in a case of *Daubeny v. Phipps*. The claim of the present plaintiff was for 2*l.* 2*s.* per diem during his attendance at the trial, 1*l.* 1*s.* for his expenses, and 1*s.* 3*d.* per mile for his travelling expenses. He had received 5*l.* at the time of the *subpœna* being served upon him, and did not at that time make any further demand. The defendant's case was, that the plaintiff had not given his attendance in the character of a witness during the whole of the time in respect of which he claimed to recover; but no objection was taken to the plaintiff's case, on the ground that a witness who is subpœnaed is not entitled to a remuneration for his expenses. The learned Judge directed the jury, that if the plaintiff came to town as a witness, he would be entitled to receive his expenses; and he left it to them to decide whether the plaintiff had attended in town for as long a period as he claimed to be paid for. The jury found a verdict for the plaintiff for 19*l.* 19*s.* in respect of his expenses, excluding any compensation for loss of time.

Whitehurst having obtained a rule *nisi* for a new trial, on the ground of misdirection, and also of the verdict being against the evidence,

Macaulay, Mellor, and Field showed cause :

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In the first *place, the defendant cannot at this period avail himself of the proposed objection to the ruling of the learned Judge, for no point was made at the trial on his behalf, that an implied contract did not exist between the plaintiff and the defendant, that the former was to have his expenses reimbursed ; the only question raised was, whether the plaintiff attended the trial as a witness on his *subpœna*, or in some other character. * * But assuming the objection to be open to the defendant, the authorities show, that a party who attends as a witness upon his *subpœna*, is entitled to receive repayment of his expenses from some one. [They cited *Robins v. Bridge* (1), *Collins v. Godefroy* (2), *Willis v. Peckham* (3), *Hallet v. Mears* (4).] There may be good grounds for saying, that if the witness is put to no expense whatever, he is bound by a kind of social duty to afford his time in giving evidence ; but it would be a harsh rule to establish, that a witness is not to *be reimbursed, unless, at the time of the service of the *subpœna*, he expressly applies for his expenses. He may not, and in most cases will not, have any sure means of ascertaining their probable amount. A witness who is served with a *subpœna* is bound to attend : *Goodwin v. West* (5), *Amey v. Long* (6) ; and if he does so, his attendance is a sufficient consideration to support a promise to pay his expenses : *Bentall v. Sydney* (7). The Legislature has created a duty to pay these expenses by statute, 5 Eliz. c. 9, s. 11, which was only in affirmance of the common law. It is a condition precedent to an attachment against a witness for not attending pursuant to his *subpœna*, that his expenses should have been tendered him. The books of precedents contain counts in a form similar to the present.

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Whitehurst and Hayes in support of the rule :

A witness cannot maintain an action for his expenses against the party who subpœnaed him, unless there has been a special contract between them. There is no distinction in principle between an action by a witness for compensation in respect of loss of time, and for the recovery of expenses.

(PARKE, B. : The statute 5 Eliz. c. 9, recognises the obligation of the party to pay the expenses.)

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| (1) 49 R. R. 531 (3 M. & W. 114). | (5) Cro. Car. 522, 540. |
| (2) 35 R. R. 496 (1 B. & Ad. 950). | (6) 9 R. R. 589 (1 Camp. 14, 180 a ; |
| (3) 21 R. R. 706 (1 Brod. & B. 515). | 9 East, 473). |
| (4) 12 R. R. 296 (13 East, 15). | (7) 10 Ad. & El. 162. |

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The same rule applies to a witness attending in a civil as in a criminal proceeding.

(PARKE, B. : In a criminal proceeding his attendance is a matter of paramount public importance ; and besides, the witness is to be paid by the county, and not by the prosecutor, so that there can be no implied promise to pay.)

ALDERSON, B. : In a criminal case, the expenses of the witness need not be tendered.)

In *Goodwin v. West*, an express promise was alleged in the declaration.

[*958] (PARKE, B. : There is an implied contract arising out of the duty to attend, in consequence of the service of the *subpœna*. The party at whose instance it *is served, does what is tantamount to saying, "If I do not pay your expenses now, I will at a future time." In *Robins v. Bridge*, it was not doubted that the defendant in the action was liable ; the only question was whether the attorney was.)

It is submitted that no implied promise can arise to pay expenses, incident to the discharge of an obligation imposed by law.

(ALDERSON, B. : Surely no person can be compelled to do an act for the benefit of another without being paid his expenses.)

The witness may decline to attend, unless his expenses are paid ; he may, however, waive that right : *Newton v. Harland* (1) ; and if he do so, he has no remedy by action. (They also referred to *Vansandau v. Browne* (2).)

PARKE, B. :

It is not absolutely necessary to decide the abstract point, whether, in the absence of an express contract, a witness can maintain an action for his expenses against a party to the suit who has subpoenaed him, because that objection ought to have been taken at the trial. The cause was conducted irrespective of that point, and had the defect been pointed out, it might perhaps have been supplied ; it would therefore be unjust to grant a new trial on that ground. But I think the plaintiff could maintain the action,

(1) 56 R. R. 488 (1 Man. & G. 956).

(2) 35 R. R. 571 (9 Bing. 402).

even supposing there was no express contract between the parties. If a witness in a civil action chooses to go to the Assizes without any tender of, or asking for, his expenses, that is some evidence for the jury that both parties understood that he was to be paid his expenses if he went. Therefore, upon the principal ground, the rule ought to be discharged; but, on the ground of the verdict being against evidence, the rule may be absolute for a new trial on payment of costs.

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ALDERSON, B.:

I am of the same opinion. It appears to me that the plaintiff has a right to maintain the action, *and that there was some evidence in support of his claim. The only question is, whether there must be an express promise to pay the expenses, or whether a promise is to be implied from the nature of the transaction. I think it is. The one party is to receive a benefit, the other to confer it. If a person goes to another, and, by a *subpoena*, desires the latter to serve him by giving evidence at a trial, and he, having a right to refuse unless his expenses are paid, goes to the trial, it is upon the faith that what he does not require to be paid will be paid; and therefore it is very reasonable to imply a promise to pay. That is the conclusion to be drawn by the jury from the facts, and in this case they might have inferred a promise to pay a reasonable remuneration. The point, however, was not raised at the trial, or my brother PLATT would have submitted it to the jury.

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PLATT, B., concurred.

Rule accordingly.

IN THE EXCHEQUER CHAMBER.

(IN ERROR FROM THE COURT OF EXCHEQUER.)

DODGSON v. BELL.

(5 Ex. 967—979; S. C. 1 L. M. & P. 812.)

The defendant's wife *dum sola* became an original shareholder in a banking co-partnership; after her marriage, but without the defendant's knowledge, she received dividends and paid calls in her maiden name, and in that name was returned to the Stamp Office as a shareholder, but never executed any deed of settlement. The defendant was aware that his wife was a shareholder, but never interfered in the matter, and, when applied to for a call, said he would have nothing to do with it. The deed of

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settlement provided, that the husband of any female shareholder should not be a member in respect of such shares, but might either dispose of the shares so vested in him, or at his option become a member on complying with certain requisitions: Held, that the defendant was not a member of the Company for the purpose of execution against him by *scire facias* on a judgment against the public officer under the 7 Geo. IV. c. 46, s. 13.

SCIRE FACIAS by the plaintiff, as public officer of "The Bank of Whitehaven," on a judgment for 1,844*l.* 7*s.* 8*d.* recovered against the public officer of "The Newcastle-upon-Tyne Joint-Stock Banking Company." The *scire facias* stated in the usual form the recovery of the judgment, and alleged that the defendant, at the time of the issuing of the writ of *scire facias*, was a member of the last-mentioned Company. Plea, that the defendant was not, at the time of the issuing of the writ of *scire facias*, a member of the copartnership called "The Newcastle-upon-Tyne Joint-Stock Banking Company," *modo et formâ*.

The issue raised on this plea was tried before Patteson, J., at Newcastle-upon-Tyne, on the 30th of July, 1849. The material facts proved and admitted by the parties to be true were as follows:

The defendant, on the 23rd of September, 1843, married one Mary Stephenson, who, in 1839, became, and at the time of her marriage continued to be, a shareholder in the Newcastle-upon-Tyne Joint-Stock Banking Company, in respect of twenty original shares of 25*l.* each, which were allotted to her by the directors of the Company on her application. She received dividends upon those shares up to the beginning of the year 1846; and she paid calls made upon her by the Company in respect of the said shares before her marriage, and one call after her marriage. She *never executed the after-mentioned deed, nor any deed of accession thereto, nor was she ever required to do so; but a letter of allotment was delivered to and received by her in the following form:

"Newcastle-upon-Tyne Joint-Stock Banking Company.

"NEWCASTLE, 19th April, 1839.

"MADAM,—The directors have allotted you twenty shares in the stock of this Company, on which you are requested to pay the first instalment of 2*l.* 10*s.* per share on the 1st of April, the second on the 1st of July, and the 3rd on the 1st of October next, either at this office, or at the office of the London and Westminster Bank, 38, Throgmorton Street, London.

"The deposit of 2s. 6d. per share, and the first instalment of 2l. 10s. to be paid at the Bank on the 20th instant.

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"I am, &c.,

"JOHN MORISON, Manager."

"MISS MARY STEVENSON, Newcastle."

The several instalments and the deposit in the letter mentioned were paid by Mary Stevenson, at the times and in the manner in the letter mentioned.

The receipts given by Mary Stevenson for the last three dividends received by her on her said shares were in the form following:

"No. 76.

"Dividend warrant.—Half-year ending 30th of June, 1844. M. Bell (late Miss Stephenson). Stock paid up, 250l. Dividend at 6l. per cent., 7l. 10s. Newcastle-upon-Tyne, 8th of April, 1846. Newcastle-upon-Tyne Joint-Stock Banking Company. Pay self or bearer the sum of 7l. 10s.

"7l. 10s. (Signed) "MARY STEPHENSON"(1).

The calls were paid by Mary Stephenson in her own name; and the name of the defendant never appeared in the books of the Bank, nor in the shareholders' register of the Banking Company; and Mary Stephenson was always returned to the Stamp Office in London, in the yearly list of shareholders, as a shareholder in her maiden name. The defendant was not aware of his wife Mary Stephenson paying any of the calls, or receiving any of the dividends as aforesaid; but he knew that she was a shareholder in the Bank when he married her.

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The Company's deed of settlement was put in evidence, bearing date the 2nd of July, 1836, the material parts of which are as follows:

By the interpretation clause it was provided, that the expressions "shareholders" and "members" shall respectively mean the owners for the time being of shares in the capital of the said Company.

Clause 12. "That the persons in whose names the shares should stand should be deemed the owners thereof."

Clause 13. "That the shares in the capital of the Company shall, as between the shareholders thereof and their respective representatives, be considered as personal estate; and that there shall not be

(1) The other two receipts were in the same form, except that, instead of the words "M. Bell (late Miss Stephenson)," the words used were "Miss Mary Stephenson."

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any right of survivorship amongst the shareholders with respect to such shares, but that every shareholder shall have a separate right to his share, and the same shall be vested in him as part of his personal estate, but subject to such provisions in the deed of settlement as shall for the time being affect such shares."

Clause 14. "That each shareholder shall be entitled to the profits, and be subject to the losses of the Company, in proportion to the number of shares."

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Clause 27. "That before the assignee of a bankrupt or insolvent shareholder, or the executor, administrator, or legatee of a deceased shareholder, or the husband of any female shareholder, shall sell, transfer, or assign any shares vested in him in any such capacity, or shall become *a member of the Company in respect of such shares, or receive any dividend in respect of the same, he shall leave for inspection, at the banking-house of the Company in Newcastle-upon-Tyne, the assignment, probate, or the letters of administration under which, or the certificate of the marriage with the person in whose right he shall claim to be entitled to such shares, or shall otherwise prove his title thereto to the satisfaction of the directors."

Clause 28. "That the husband of any female shareholder, or the executor, administrator, or legatee of any deceased shareholder, or the assignee of any bankrupt or insolvent shareholder, shall not be a member of the Company in respect of the shares vested in him in any of those capacities; but such assignee, husband, executor, administrator, or legatee, may either dispose of the shares so vested in him, or, at his option, become a member of the Company in respect of such shares, on complying with the provisions next hereinafter expressed."

Clause 29. "That the husband of any shareholder, or the executor, administrator, or legatee of a shareholder, who shall be desirous of becoming a member of the Company in respect of the shares which may so become vested in him, shall give notice in writing at the banking-house of the Company in Newcastle-upon-Tyne of such his desire; in which notice shall be expressed the name and place of abode of the person giving the same, and the name of the shareholder in whose right he claims, and the number of shares in respect whereof he is desirous of becoming a member; whereupon, and upon otherwise complying with the provisions of the deed of settlement, he shall be admitted a member of the Company in respect of such shares, and have the same transferred

into his own name; and shall be personally charged with the duties and liabilities incident to the ownership thereof."

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Clause 30. "That the husband, or the executor, administrator, or legatee of any shareholder, who shall not so *elect to become a member of the Company, and also the assignee of every bankrupt or insolvent shareholder, shall be entitled to receive any dividend which shall have become due on the shares so vested in him before his title thereto accrued, but not to any dividend which shall become due on the same shares after his title shall have accrued; but, till some person shall have become a member of the Company in respect of the same shares, such dividends shall remain suspended, and shall not be paid till the transfer of the shares, in respect of which such dividends became due, shall be completed; and the new holder thereof may claim the same; and every transfer shall carry with it the profits and dividends of the share of the capital and of the guarantee fund in respect of the shares so transferred, so as to bar the right and interest of the party making such transfer in respect of such transferred shares."

Clause 31. "That in case any person in whom any shares shall, by original subscription, or by purchase, bequest, marriage, representation, or other mode of acquisition or devolution, become vested, and who shall not have executed the deed of settlement, shall, for six calendar months after notice in writing given to him for that purpose, neglect or refuse to execute the same, the directors may declare the shares so vested in the person so neglecting or refusing, and all benefit thereof, to be forfeited to the other shareholders, and the same shall be forfeited accordingly."

Clause 32. "That every person to whom shares shall be transferred, and who shall not then be a member of the Company in respect of any other shares, and every person who, being the husband of any shareholder, or the executor, administrator, or legatee of any shareholder, shall, by notice in writing as aforesaid, signify his desire to become a member of the Company in respect of the shares vested *in him in such capacity, and shall not at the time of the said shares becoming vested in him be a member of the Company in respect of any other shares, shall, as to all duties, obligations, claims, and demands upon or against him in respect of such shares, be considered a member of the Company from the time of the same shares being so transferred to or so becoming vested in him; but as to all profits and rights, privileges, and benefits to arise

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from the same shares, such person shall not be considered as a member, until he shall have executed the deed of settlement, or some deed of accession thereto."

It was further proved, that the defendant had never done any of the acts required by the 29th clause; and that, in answer to an application made to him by the solicitor of the Company touching a call upon the said shares, he replied, that "he would have nothing to do with it, and would not interfere at all." Neither the said Mary Stephenson nor the defendant made any assignment or transfer of these shares. The learned Judge directed the jury that the defendant was entitled to a verdict; and the jury accordingly found for the defendant.

The plaintiff's counsel tendered a bill of exceptions to the above ruling; and a writ of error having been brought thereon, the case was argued (November 30 (1)), by

Unthank for the plaintiff :

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The object of this bill of exceptions is to review the decisions of the Court of Exchequer in *Ness v. Angas* (2) and *Ness v. Armstrong* (3), which, it is submitted, cannot be supported. The judgment of the LORD CHIEF BARON in *Ness v. Angas* proceeds on the mistaken notion that the plaintiff might have resorted to the common-law remedy by action against the *defendant as a partner; but it is evident from the case of *Steward v. Greaves* (4) that the members of a banking copartnership, established under the 7 Geo. IV. c. 46, can only be rendered liable by *scire facias* on the judgment against the public officer. The question then is, whether that statute applies to persons in the situation of partners at common law, or whether the term "member" must be construed with reference to the deed of settlement, and as meaning partners *inter se*. The 7 Geo. IV. c. 46, begins by reciting the 39 & 40 Geo. III. c. 28, which declares the privilege of the Bank of England to be that no partnership exceeding six persons shall carry on the business of bankers. That affords some key to the construction of the statute in question. The privilege of the Bank of England would be of little value, if it were competent for any number of persons to establish themselves as a banking copartnership, while, under certain circumstances, six only of them were to be considered

⁽¹⁾ *Coram* Patteson, J., Coleridge,
Whitman, J., Erle, J., Talfourd,
Williams, J.

(2) 3 Ex. 805.

(3) 80 R. R. 464 (4 Ex. 21).

(4) 62 R. R. 730 (10 M. & W. 711).

as members. The 7 Geo. IV. c. 46, s. 1, then enables banking copartnerships, of more than six persons, to be established on certain conditions ; but expressly provides that every "member" shall be responsible for all the debts of the Company, notwithstanding any agreement to the contrary. The term "member" is there used in the sense of partner at common law. The 12th clause of the deed says, that those only shall be members whose names are on the register of shareholders ; so that if the word "member" in the statute is to be construed by the terms of the deed, there would be a great opening for fraud. A number of wealthy persons might form a banking copartnership, and, by putting on the register the names of persons of no responsibility, reap the profits but escape the loss ; or if women only were shareholders, and they all married, their *husbands would receive the benefit, but incur no risk. Throughout the 7 Geo. IV. c. 46, the word "member" is used as synonymous with "partner." The remedy given by the 9th section is confined to debts owing to or from the "copartnership." That manifestly applies to the Company *quà* partners, because the 12th section provides, that every judgment against the public officer shall have the same effect against the property of the copartnership and of every member thereof, as if it had been recovered against the copartnership. Then, by the 13th section execution upon a judgment against the public officer may be issued against any member for the time being of the copartnership ; or, if that be ineffectual, against any person who was a member at the time of the contract, or became a member before then, or was a member at the time of the judgment ; provided, that no execution shall issue after the expiration of three years after any person shall have ceased to be a member. That is a bargain made with the Bank of England in consideration of its waiving its privileges. The creditor's right to sue persons who have ceased to be members is limited to three years ; on the other hand, the creditor has the advantage of suing partners who take upon themselves the liability of the original members, or, if that be unavailing, the members at the time of the judgment. Those provisions ought to receive a liberal construction in favour of creditors, and not a strict construction in favour of debtors, who enter into the deed of partnership unknown to creditors. ROLFE, B., in his judgment in *Ness v. Angas*, considered that the term "member" meant a member in the strictest sense of the word,

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inasmuch as the doctrine respecting persons holding themselves out as partners, and entering into contracts in that character, did not apply to copartnerships of this kind. The question as to the liability of a person by holding himself out as a partner can very seldom *arise in the case of a Joint-stock Company; but supposing it did, if the process were against a member at the time of execution or of judgment, the holding himself out as a partner would not prove him to be so; but it would in the case of a partner at the time of the contract, for there is no reason why a person who obtains something from another by that representation should not be estopped from saying that he is not a partner. However, the question here is, whether the defendant is a partner; and though he does not comply with the strict formalities of the deed, it is he who in point of law has a right to participate in the profits, and is therefore a partner. There is nothing in the deed to prevent the transfer of these shares by operation of law; on the contrary, the marriage divests them from the wife, and gives them to the husband, the same as, on her death while sole, they would pass to her executor, or, on her bankruptcy, to her assignee. Clauses 27, 28, 29, and 30 treat the shares as having vested in the husband. They give him the option of being placed on the register of shareholders, or of transferring the shares. The profits are only suspended until he has exercised his option; if he were to sell the shares, he would convey all the profits from the time he became a member.

(ERLE, J.: Marriage, death, or bankruptcy, in general, dissolves partnership. You say, that if the husband, executor, or assignee refuse to sell, they become partners?)

WIGHTMAN, J. : Do you contend that an executor would become a member against his will?)

The deed makes him a member, for by it his testator has agreed to take an undivided share in the stock of the Company. He may, however, plead that the shares are worthless, and that he has no assets. A husband may transfer the shares, and so rid himself of all liability. There are numerous cases which show that the husband of a female shareholder in a Joint-stock Company is liable as a contributory under the *Winding-up Act: *Klught's* case (1), *Gouthwaite's* case (2), *Burlinson's* case (3), *Sadler's* case (4).

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- (1) 3 De G. & Sm. 210.
(2) 3 De G. & Sm. 258.

- (3) 3 De G. & Sm. 18.
(4) 3 De G. & Sm. 36.

Knowles (with whom was *Hugh Hill*), for the defendant in error, was not called upon to argue.

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PATTESON, J. :

This is a *scire facias* to fix the defendant with the payment of a judgment debt recovered against the public officer of the Newcastle-upon-Tyne Joint-Stock Banking Company, of which the defendant is alleged to be a member for the time being. The Act upon which the *scire facias* is founded, is the 7 Geo. IV. c. 46, s. 13. (His Lordship read the section.) The facts of the case were all admitted, for the purpose of reviewing the decisions of the Court of Exchequer in *Ness v. Angas*, and *Ness v. Armstrong*, upon which at the trial I was requested to act. It appeared that the defendant's wife was a member of the Company originally, but she never executed any deed. Probably that is not very material. The defendant, when he married her in 1843, was aware that she had some shares in this Company ; but he never interfered in the matter, or took any steps to have the shares transferred into his own name in the books of the Company ; and they continued there in his wife's maiden name, and the return to the Stamp Office was in that name. It also appeared, that she paid some calls, and received dividends after her marriage ; and it is found also, that her husband was not aware of these facts, and that, on his being applied to for a call, he said he would have nothing to do with it. He therefore has done no act himself of any kind, by which he has taken to himself the benefit of these shares. So far this case differs from *Ness v. Angas*, because there the husband had received dividends in his wife's name, and besides, in that case, the shares were bought by the wife *after her marriage. The question here is, whether the defendant was shown to be a member for the time being of the Company. Some observations were made as to the effect of the recital in the Bank of England Act, but that has no bearing on the case. It is argued, that these shares would vest in the husband in his marital right upon his marriage ; that by the common law he would become a shareholder ; and that there is nothing in the deed to prevent the operation of the common law. It may be true that these shares, being personal property, would vest in the husband ; but that must be subject to the provisions of the deed of partnership by which the Company was originally constituted, so far as those provisions are consistent with the law of the land. I do not see how any one can entertain a doubt about those provisions. By clause 12, the persons in whose names the

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shares shall stand, shall be deemed the owners : the only person in whose name these shares stood was the wife *dum sola*. Perhaps, however, that circumstance is not conclusive. Then clauses 27 to 32 show what is to be done in case of a transfer by operation of law, in order to render the person to whom the shares are so transferred a member of the Company. If any words can be clear, those words are clear, that the mere vesting by operation of law of shares in the husband shall not make him a member of the Company, unless he has done certain acts. The word "vested," in the deed, has been pressed upon us in order to found an argument that the deed itself acknowledged that by marriage the shares vested at common law in the husband. It recognises his right indeed, but says, that he must complete that right by doing certain acts before he can become a member. By clause 27, he must leave with the Company a certificate of his marriage. Then an option is given him either to sell the shares or to become a member, provided he has furnished the Company with such certificate. (His Lordship read clause 28.)

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If those words have any meaning, *they show, that so far as regards the members of the Company *inter se*, the husband does not become a member by reason of the shares having vested in him in his marital right, unless he takes some further steps. Then clause 29 shows what steps are to be taken when he desires to become a member : he is to give notice of his desire, and to comply with the provisions of the deed ; and thereupon he will be admitted a member, and have the shares transferred to him; and then he is liable to be personally charged with the debts and liabilities incident to the ownership thereof. By clause 30, if he does not elect to become a member, the dividends are to be suspended till some person becomes a member in respect of the shares. Then follows a proviso, clause 31, that if any person in whom any share shall become vested shall for six months neglect or refuse to execute the deed of settlement, the directors may declare the shares so vested, forfeited. Then again, by clause 32, the husband of any shareholder, who shall by notice in writing signify his desire to become a member, shall as to all obligations be considered a member from the time the shares vested in him, but not as to the profits until he has executed the deed of settlement. Can any provisions be more clear, so far as regards the rights of a person who has married a female shareholder? They distinctly provide, that he shall not be entitled to any profits until he shall come in and execute the deed ; and that, if he does not choose to do so, or to transfer them to any one else, after six

months' notice the shares shall be forfeited. It is clear, therefore, that the defendant, not having done any act of any sort, or intimated a wish to become a member of the Company, is not a member so far as the Company is concerned. Then, is he a member as regards creditors? It is admitted that he cannot be made a member by having induced persons to contract with him in that character, because here there are no such facts. Then, how is he a member? The 7 Geo. IV. c. 46, requires that *he should be a member for the time being; but if he is not a member of the Company *inter se*, how can he be a member at all? In the case of *Ness v. Angas*, ROLFE, B., explains how it is that a person who holds himself out as a partner is made liable, not because he is a partner, but because he is not allowed to take advantage of his own wrong. We are all of opinion that, under this Act of Parliament, it is necessary that the person sought to be made liable should be an actual member of the Company; and that he does not become a member, and consequently subject to the proceeding by *scire facias*, until he has complied with the terms of the deed of settlement. Reference has been made to several decisions under the Winding-up Act; but they have little bearing on the present case. In *Angas's* case (1), the husband of a female shareholder was held not to be a contributory. But, in one or two of those decisions, where the husband was held to be a contributory, the wife *dum sola* had covenanted to do certain things, and therefore the husband was held liable; and an executor was held a contributory in his representative character. Here the difficulty is to establish the fact of the defendant being a member, for the circumstances negative any such conclusion; and therefore the verdict was quite right, and the judgment must be affirmed.

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Judgment affirmed.

(1) 75 R. R. 196 (1 De G. & Sm. 560).

IN THE QUEEN'S BENCH.

BAKER *v.* COTTERILL.

1849.

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(7 Dowl. & L. 20—24; S. C. 18 L. J. Q. B. 345; 14 Jur. 1120.)

Declaration in *indebitatus assumpsit* containing several counts, to which the defendant had pleaded generally *non assumpsit* and payment. After issue joined, "all matters in difference in this cause" were, by a Judge's order, referred by consent; the costs of the cause "to abide the event." The order provided "that the arbitrator shall be attended by" W. T., "as his attorney, at the hearing, and" (*sic*) "shall draw the award." The award recited the order and the employment of W. T. to draw the award, and awarded, "that there is due from the defendant" "to the plaintiff" the sum of 44*l.* 19*s.* 7½*d.*, "in respect of all the matters in difference so referred to me in and by the" "order of reference," &c.

On showing cause against a rule for the payment of the sums awarded, under the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 18: Held, that the award was good, although there was no specific finding on each particular issue; as it was clearly to be inferred from the award that the arbitrator had found all the issues in favour of the plaintiff.

Held also, that the employment of W. T. to draw the award was not a delegation of authority.

Held also, that it was not necessary in order to obtain a rule for the payment of the sum awarded (under the Judgments Act, 1838, s. 18), that the award should contain an order to pay the money (1).

A RULE had been obtained in last Easter Term, calling upon the defendant to show cause why he should not pay two several sums of 44*l.* 19*s.* 7½*d.*, and 68*l.* 6*s.* 4*d.*, pursuant to an award made in the above cause between the parties.

The following facts appeared upon the affidavits. The action was in *indebitatus assumpsit*, and the declaration contained several counts, to which the defendant had pleaded the general issue and payment. After issue joined and before the cause was entered for trial, an order of reference was made by consent, by a Judge at Chambers, on the 12th of March, 1849. It ordered "that all matters in difference in this cause be referred to the award of," &c., "and that the arbitrator shall be attended by Mr. William Thomas, as his attorney, at the hearing, and" (2) "shall draw the award." The costs of the cause were "to abide the event of the award," and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator, on the 16th of April following, made his award. It recited the order of reference, and that the arbitrator had inquired into the matters referred, and had employed Thomas, as his attorney, to draw the award, and proceeded thus: "I do

(1) Approved, *Bowen v. Bowen* the Arbitration Act, 1889, s. 12. (1862) 31 L. J. Q. B. 193; and see (2) *Sic*.

hereby award, order, arbitrate, and determine, that there is due from the defendant William Cotterill, to the plaintiff, Joseph Baker, the sum of 4*l.* 19*s.* 7½*d.*, in respect of all the matters in difference so referred to me in and by the said recited order *of reference as aforesaid. And I do hereby further award," &c., "that the costs of the reference and, of this my award shall be paid by the defendant, William Cotterill, to the plaintiff, Joseph Baker."

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It appeared upon the affidavits, that the arbitrator had been attended by Mr. Thomas, as his attorney, at the meetings, and that the award had been drawn up by that gentleman. The costs had been taxed at a sum of 6*l.* 6*s.* 4*d.*, and this sum, together with the sum of 4*l.* 19*s.* 7½*d.*, had been duly demanded of the defendant, and remained unpaid, whereupon the present rule had been obtained ; against which,

J. Brown now showed cause :

First, the award is bad for not specifically finding on each of the issues. The costs of the cause were "to abide the event;" and therefore the arbitrator was bound to find on each issue in the cause. In finding a sum due from the defendant to the plaintiff, the arbitrator may yet have decided the issues of *non assumpsit* and payment against him on some of the counts in the declaration. In *Bourke v. Lloyd* (1), it was held, that where a cause, in which there are several issues, is referred, and the costs of the cause are to abide the event, the arbitrator must award specifically on each issue; and that a general award, that the plaintiff had good cause of action against the defendant, and that the defendant should pay to the plaintiff a certain sum, is bad. So in *Kilburn v. Kilburn* (2), where the declaration contained several counts, to which the defendant had pleaded *non assumpsit*, payment, and set-off; an award that the defendant was indebted to the plaintiff in a certain sum, and that final judgment should be entered for the plaintiff for that sum, was held bad for not specifically finding on the issues raised on each of the counts in the declaration, by the plea of *non assumpsit*.

(WIGHTMAN, J. : Here, however, the arbitrator *finds the sum due "in respect of all the matters in difference so referred." There were no such words in *Kilburn v. Kilburn* (2). Besides that case

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(1) 62 R. R. 701 (10 M. & W. 550 ; S. C. 2 Dowl. N. S. 452). (2) 67 R. R. 780 (13 M. & W. 671 ; S. C. 2 Dowl. & L. 633).

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differs from the present, inasmuch as there the reference was of "all matters in difference between the parties;" and it might be that the arbitrator was of opinion that the plaintiff was entitled to recover in respect of matters in difference not included in the action, although not entitled to recover in respect of those for which the action was brought. The Court there say, "the award must either dispose specifically of each issue," "or it must be clearly inferred from it in which way each of these issues has been found.")

In the present case, the Court cannot see that the sum awarded to be due must have been due in respect of two counts only.

(WIGHTMAN, J.: The award says it is due "in respect of all the matters in difference so referred," which are the "matters in difference in this cause." If an award be sufficient when it can be ascertained by clear inference how each issue has been disposed of, I think that here it may clearly be inferred, that unless the plaintiff was entitled to recover in respect of each of the counts in the declaration, there could not be a sum due to him, "in respect of all the matters in difference," in the cause.)

It is submitted that the award means all that is due, not in respect of each count, but upon the whole of the matters.

(WIGHTMAN, J.: Would it be sufficient if he had said, "in respect of all matters in difference in the first, second, third, and fourth counts mentioned?")

Perhaps that might have been good.

(WIGHTMAN, J.: I think that the words which he has used, mean the same thing.)

There is no case in which the language used has been the same as in the present. In *Stonehewer v. Farrar* (1), this Court affirmed the principle laid down in *Kilburn v. Kilburn*; although indeed it was not necessary to decide the point. Lord DENMAN, Ch. J., there says, "all arbitrators would do wisely by finding *distinctly on each issue: though I do not say that, where this is not done, the award may not raise so clear an inference of a finding on each issue

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(1) 66 R. R. 544 (6 Q. B 730, 740).

as to exclude the objection of uncertainty. But it is better to avoid any such question " (1).

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Secondly, the award states on the face of it that it is drawn up by Thomas, the attorney of the arbitrator, and not by the arbitrator himself. That is a delegation of authority which vitiates the award. The reference may probably have been intended to authorize the award being so drawn up, but it is at any rate obscurely worded, and the grammatical construction of the words as they stand is, that the arbitrator shall draw the award.

(WIGHTMAN, J.: I do not think that there is anything in the objection. "Drawing" the award must merely mean putting the finding of the arbitrator into proper form and language.)

Thirdly, there is no order on the defendant to pay the money. It has been decided that where there is no order to pay the money, the Court will not enforce the payment by means of an attachment: *In re Seaward v. Howey* (2); and the remedy now sought under 1 & 2 Vict. c. 110, s. 18, is merely substituted for an attachment, and requires the same formalities. It is clear, that all that the Court will do in cases of this kind, is to order what the award orders: *Jones v. Williams* (3).

J. Russell, in support of the rule:

As to the last point, in *Edgell v. Dallimore* (4), where an attachment was refused on the ground that the award, which found the debt, contained no order to pay; the distinction was drawn between an attachment, which was a criminal proceeding, and a civil proceeding like the present; and has been constantly *acted on since. (He was then stopped by the Court.)

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WIGHTMAN, J.:

I think that there is no weight in any of the objections that have been urged, and that this rule must therefore be made absolute.

It has been sought to support the first objection by cases which are not exactly in point. The cases of *Kilburn v. Kilburn* (5), and *Stonehewer v. Farrar* (6) merely decide, that where a cause and all

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| (1) See <i>Hobson v. Stewart</i> , 75 R. R. 883 (4 Dowl. & L. 589), and note (a), <i>Birks v. Trippet</i> , 1 Wms. Saund. 33, 6th ed. | <i>S. C.</i> 4 P. & D. 217). |
| (2) 7 Dowl. 318. | (4) 3 Bing. 634; <i>S. C.</i> 11 Moore, 541. |
| (3) 52 R. R. 299 (11 Ad. & El. 175; | (5) 67 R. R. 780 (13 M. & W. 671; <i>S. C.</i> 2 Dowl. & L. 633). |
| | (6) 66 R. R. 544 (6 Q. B. 730). |

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matters in difference are referred, and there are several issues, "the award must either dispose specifically of each issue," "or it must be clearly inferred from it in which way each of these issues has been found." I think that applying that rule to the present case, I must take it as clearly to be inferred from this award, that the arbitrator has decided all the issues in favour of the plaintiff.

The declaration contains several counts, to which the defendant has pleaded the general issue and payment; and the award finds that "there is due from the defendant" to the plaintiff, a certain sum. The above-mentioned cases however, were relied on as showing, that where there are several counts, to which there are pleas of the general issue and payment, an award of a sum generally, without finding on each count, is bad. If, therefore, the award in the present case had stopped here, I should have felt bound by those decisions; but it goes on to say, "in respect of all the matters in difference so referred to me in and by the said recited order of reference as aforesaid," &c. I think, therefore, that I must hold by necessary intendment that the arbitrator has awarded in respect of all the matters in difference in the action, there being none other referred to him, and, consequently, in respect of all the issues. The award is therefore good, and the rule must be made absolute.

Rule absolute.

1849.

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EX PARTE SENIOR (1).

IN RE THE SOUTH YORKSHIRE, DONCASTER, AND GOOLE RAILWAY COMPANY.

(7 Dowl. & L. 36—40; S. C. 18 L. J. Q. B. 333; 14 Jur. 1093.)

Where proceedings by arbitration under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 23, *et seq.*, have proved abortive in consequence of the non-appointment of an umpire within the time limited by the statute, the owner of the land is not bound to proceed anew under the 68th section: but in the event of a refusal by the Company, is entitled to a *mandamus* to compel them to issue their warrant to summon a jury to assess compensation.

In such a case, a neglect to issue the warrant, after a demand made upon the solicitors of the Company, is a sufficient refusal to entitle the claimant to the writ.

A RULE had been obtained calling on the South Yorkshire, Doncaster, and Goole Railway Company to show cause why a writ of

(1) And see *Fotherby v. Metropolitan Ry. Co.* (1866) L. R. 2 C. P. 188, 36 L. J. C. P. 88, 15 L. T. 243; *Morgan v. Metropolitan Ry. Co.* (1868) L. R.

4 C. P. 97, 38 L. J. C. P. 87, 19 L. T. 655, Ex. Ch.; Judicature Act, 1873, s. 25, sub-s. 8; R. S. C. Ord. LIII. rr. 1—4.

mandamus should not issue directed to *them, commanding them to issue their warrant to summon a jury to assess compensation, under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, for certain land required by the Company.

Ex parte
SENIOR.
[*37]

The following facts appeared upon the affidavits. In May, 1848, the Railway Company requiring certain land in the occupation of Mr. Senior, for the purposes of their railway, gave him the proper notice under the 18th section of 8 & 9 Vict. c. 18, the Lands Clauses Consolidation Act, that they were willing to treat for its purchase. Mr. Senior, in the following month sent in his claim, and signified his election under the 23rd section of the Act to proceed by arbitration. Two arbitrators were accordingly appointed, but some delay took place in their meeting, and when they did meet, they could not agree on the appointment of an umpire as required by the 27th section. An application was then made to the Board of Trade, under the 28th section, to appoint an umpire, but was refused on the ground that they had no power to do so, as more than three months had elapsed since the appointment of the arbitrators. A few days afterwards, namely, on the 19th of February, 1849, the claimant's solicitor wrote to the solicitors of the Company, formally demanding that the Company should issue their warrant to the sheriff to summon a jury to settle and assess the compensation due to the claimant, and, as a preparatory step, should forthwith give the notice required by the Act before issuing such warrant; and giving notice that in the event of their neglecting to do so for one week, an application would be made to this Court for a *mandamus* to compel them to issue such warrant and give such notice. On the 20th of April following, a notice of relinquishment of the right and intention of the Company to take the land, was sent by the Company's solicitors to the solicitor of the claimant. It recited the Company's original notice to treat for the purchase of the claimant's land, and that in consequence of certain deviations from the line of railway as originally proposed, the Company would not require the *claimant's land; and stated that they therefore withdrew their original notice to treat, offering to pay all costs legally incurred. No other demand had been made upon the Company to issue their warrant, than the one above-mentioned; nor was there any direct refusal in terms upon the part of the Company stated. It appeared upon the affidavits that the Company had a secretary.

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Ex parte
SENIOR.

J. S. Wortley and Wells showed cause :

The proceedings by arbitration in this case having failed, the claimant was bound to proceed under the 68th section of the Act. The sections 18 to 23, regulate the proceedings where the Company give notice of their intention to take the lands. The 23rd section enacts, that "if when the matter shall have been referred to arbitration, the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury as hereinafter provided." The latter words refer to the 68th section, which requires the Company to issue their warrant to the sheriff to summon a jury to assess compensation within twenty-one days after receiving a notice from the claimant for that purpose ; which notice is to contain a statement of "the nature" of the claimant's "interest" in the land and the "amount of the compensation so claimed." The claimant here has not brought himself within the terms of the section, for he has not given a sufficient notice to the Company. The notice relied on contains no statement of the claimant's interest or of the amount claimed, as required by the 68th section. Besides, it is given to the Company's solicitors ; whereas it ought to have been served according to the 134th section at the Company's offices or on their secretary. Even if there was a sufficient notice properly served, there has been no direct refusal on the part of the Company to issue their warrant, upon which to found an application for a *mandamus* ; and the only remedy of the claimant, if any, is by action.

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Knowles, in support of the rule :

It is a mistake to suppose that the 68th section in any way relates to proceedings like the present. It has reference to a totally different state of circumstances, namely, where the Company have taken land for the purposes of their Act, without any previous offer to purchase ; and the words "hereinafter provided," in the 23rd section may be referred to other sections, such as the 38th and following sections. The only question then is, has there been a sufficient demand and refusal ? The demand is sufficiently served on the attornies of the Company. If they are the Company's agents for the purpose of giving a notice of relinquishment, they must be their agents to receive notices like the present. The 134th section applies only to proceedings "at law or in equity."

(WIGHTMAN, J.: I do not think so.)

Ex parte
SENIOR.

As to there being no refusal on the part of the Company, it is not necessary that there should be a direct refusal if the Court can infer a refusal from their neglect.

Willes, amicus curiæ, mentioned the case of *Reg. v. South Eastern Railway Company* (1), in which he had relied on a similar objection to the one now taken; but the COURT held that the only notice necessary to be given was one that would satisfy the Court that there had been a neglect by the Company to perform their duty.

WIGHTMAN, J.:

The Master (2) informs me that in the case cited, it was held that no precise or formal notice was required to be given, but merely that enough should appear to satisfy the Court that the Company refuse to issue their warrant. I think it is sufficiently shown, in the present case, that the Company refuse to issue their warrant, and therefore, it must be governed by the case cited.

With respect to the 68th section, I think it is clear that that section does not apply to a case like the present.

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Mr. Senior is in the same situation as if he had not agreed to submit the matter to arbitration, in which case it was for the Company to issue their warrant. Enough appears to satisfy me, that they have not done so, and the rule for a *mandamus* must, therefore, be made absolute.

Rule absolute.

BRAY v. THE SOUTH EASTERN RAILWAY COMPANY.

1849.

[307]

(7 Dowl. & L. 307—311; S. C. 19 L. J. Q. B. 11; 14 L. T. 184.)

The costs of any "such inquiry" in the 52nd section of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), refer to the inquiry spoken of in the earlier part of the 51st section; namely, where the landowner recovers more than the sum offered by the Company.

Where, therefore, he recovers less or an equal sum, the Company is entitled only to one-half of the formal costs of the inquiry, and not to one-half of the costs of witnesses, and counsel also.

HOGGINS moved for a rule, calling upon the Master to review his taxation herein.

(1) Q. B. Hilary Term, 1849. Not reported. (2) Master Robinson.

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It appeared that the South Eastern Railway Company had given notice under one of their private Acts of Parliament, to a Mr. Bray, that they required his land for the purposes of the Act; and at the same time offered 1,000*l.* for his estate and interest therein. This offer was rejected by Mr. Bray, who claimed double that sum. The Company issued their warrant to the sheriff, to summon a jury to assess the compensation to be paid; and the jury found a verdict for 1,000*l.*, being the sum previously offered. Upon the taxation before the Master, under the 52nd section of *the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, the Master refused to tax to the defendants any costs, anterior to those of summoning, impannelling, and returning the jury. He also refused to allow any costs in respect of counsel, attorneys, or any other expenses beyond the sheriff's charges, the officers' fees in summoning the jury, the expenses of the special jury, and the usual expenses attendant on the taxation.

Hoggins :

According to the case of *Ross v. York, &c., Railway Company* (1), it will perhaps be objected, that the taxation by the Master's certificate under the 52nd section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, cannot be received by this Court; the reference being to him as an original arbitrator, and not by virtue of any power delegated to him by this Court. But the decision in that case, which is that of a single Judge, has been since under the consideration of the full Court. It is not sought to question the correctness of that decision, unless the Court is clearly of opinion that the Master is wrong in the view that he has taken of the construction of the Act. The sections of the Lands Clauses Consolidation Act, which regulate the proceedings to be taken, where the amount of compensation is to be ascertained by inquiry before a jury, commence at section 39. The present question arises upon the construction to be put upon sections 51 and 52. Section 51 enacts, that "on every such inquiry before a jury, where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of such inquiry shall be borne by the promoters of the undertaking; but if the verdict of the jury be given for the same or a less sum than the sum previously offered by the promoters of the undertaking," "one-half of the costs of summoning, impannelling,

(1) 79 R. R. 897 (5 Dowl. & L. 695).

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[*309]

and returning the jury, and of taking the inquiry and recording the verdict *and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the other half by the promoters of the undertaking, and each party shall bear his own costs, other than as aforesaid, incident to such inquiry." Here the verdict of the jury was for the same sum as had been previously offered; and, therefore, the case comes within the second branch of the 51st section, by which "one-half of the costs of summoning, impannelling, and returning the jury, and of taking the inquiry, and recording the verdict and judgment thereon," is to be defrayed by the owner of the lands. Then comes the 52nd section, the marginal note of which is "particulars of the costs;" and that section enacts, that "the costs of any such inquiry shall, in case of difference, be settled by one of the Masters of the Court of Queen's Bench," &c., "on the application of either party, and such costs shall include all reasonable costs, charges and expenses incurred in summoning, impannelling, and returning the jury, taking the inquiry, the attendance of witnesses, the employment of counsel and attornies, recording the verdict and judgment thereon, and otherwise incident to such inquiry." Unless the words, "the costs of any such inquiry," are to be held as referring solely to the first branch of the 51st section, the Company here, it is submitted, are entitled to one-half of those costs which the Master has disallowed. They are entitled to "one-half of the costs of" "taking the inquiry," and the 52nd section defines what those costs are.

(PATTESON, J.: Those words are used again in the 52nd section, as being included in "the costs of any such inquiry," and seem to intend something different from the costs of witnesses and counsel. If the 52nd section is to be read as applying only to the first branch of the 51st section, then the words, "taking the inquiry," have a definite meaning. The construction you contend for would render them inoperative.)

The intention of the Legislature, it is submitted, must have been, that where a landowner vexatiously refuses to accept a sum which the jury consider is the value of his land, he should *be made to bear half the costs to which the Company are put in going before a jury.

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Cur. adv. vult.

Without giving any opinion as to whether this Court has power to review a taxation by the Master, under the 52nd section of the Lands Clauses Consolidation Act, I have considered the question, whether, assuming that it has, I can see that the Master, in the present case, has come to a wrong conclusion, in the construction which he has put upon this statute, and I do not think that he has.

The 51st section provides, in substance, that where the claimant succeeds, "all the costs of such inquiry shall be borne" by the Company. And the 52nd section says, that "the costs of any such inquiry shall" "be settled by one of the Masters," &c., "and such costs shall include all reasonable costs, charges, and expenses incurred in summoning, impannelling, and returning the jury, taking the inquiry, the attendance of witnesses, the employment of counsel and attorneys, recording the verdict and judgment thereon, and otherwise incident to such inquiry." There is no doubt, therefore, that where the claimant succeeds in obtaining by the verdict of the jury a larger sum than the one previously offered, he is entitled to the costs of witnesses and counsel.

But the 51st section goes on to say, that when the Company succeeds, and the claimant recovers only the same or a less sum than that previously offered, that then, not "all the costs of such inquiry," nor "half the costs of such inquiry;" but "one-half of the costs of summoning, impannelling, and returning the jury, and of taking the inquiry and recording the verdict and judgment thereon," "shall be defrayed by the owner of the lands, and the other half by the promoters of the undertaking, and each party shall bear his own costs, otherwise than as aforesaid," that is, "other than the costs of summoning," &c., "incident to such inquiry." It seems to me, therefore, that the Legislature *meant, that in such a case, the landowner and the Company should share what may be termed the formal costs; and that each party should bear their own costs over and above the formal costs. It may be remarked, that in the 52nd section, the words "the attendance of witnesses, the employment of counsel and attorneys," are interposed between the words "taking the inquiry," and "recording the verdict." I do not see how any other construction can be put upon these sections; for the claimant is clearly to bear one-half of the costs, and yet if the witnesses and counsel were to be added, the claimant might spend 200*l.*, whilst the Company spent only 100*l.*, and yet these must be added together and

divided ; so that the Company would then be the loser, which was clearly not the intention of the Legislature.

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I, therefore, think that the Master was quite correct in the conclusion to which he came, and that no rule ought to be granted.

Rule refused.

BAIL COURT.

EAST v. SMITH (1).

1847.
May 5, 7.

Bail Court.
[2 Bail Court
Reps. 23]

(2 Bail Court Reports, 23—27; S. C. 4 Dowl. & L. 744; 16 L. J. Q. B. 292; 11 Jur. 412.)

To render a party to a bill of exchange (other than the acceptor) liable, some intimation should be conveyed to him, not only that the bill is dishonoured, but that he is looked to for payment. Where, therefore, the defendant, who was the indorser of a bill, was informed, in the course of conversation with a person not a party to the bill, but who was a foreman to a prior indorsee, that the bill had been dishonoured, but there was no evidence that he had any authority to give this notice: Held, no sufficient notice of dishonour.

ASSUMPSIT by indorsee against the maker of a bill of exchange. Plea, no due notice of dishonour. At the trial before the Judge of the Sheriffs' Court, it appeared that the bill of exchange in question was drawn by the defendant upon, and accepted by one James Maclean, on the 22nd of September, 1846, payable one month after date, whereby it would become due on Saturday, the 24th of October. The bill was then indorsed by the defendant to one William Day, who then indorsed it to the plaintiff. In support of the plaintiff's case his son was called, who stated that on Saturday, the 24th of October, he called on the acceptor, who said he would pay it on Monday, and that afterwards, on the same day, he called at the drawer's, and there saw a person of the name of Pritchard, who was foreman to William Day (the party who indorsed to plaintiff), and told him what had occurred, that Maclean had not paid. Pritchard was then called, who stated that after the plaintiff's son had told him about the bill, the defendant himself called at nine o'clock in the evening, and asked if the bill had been taken up, "Maclean's bill," that he, Pritchard, told him "No, and that East had presented it, and it was not taken up." William Day (the indorsee) then deposed that he saw East, the plaintiff's son, on the day the bill was due, and that he told him it was dishonoured, and that on the next Sunday the defendant himself called about it, and that he (Day) told him that Maclean had not taken it up. Upon this it was objected, on the part of the defendant, that there was no sufficient notice of dishonour. *The case, however, went to the jury, who found for the plaintiff, leave having been reserved to

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(1) Bills of Exchange Act, 1882, ss. 48, 49. [This report is here preferred to the other contemporary ones,

as being the shortest, and also because the volume from which it is taken is now scarce.--F. P.]

enter a nonsuit. *Corrie* accordingly, in Hilary Term, obtained a rule, calling upon the plaintiff why the verdict should not be set aside, and a nonsuit entered.

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Martin now showed cause :

So that the party from whom payment is sought had actual notice of dishonour in due time, it is immaterial from whom he received that notice. In this case the defendant, who was the drawer, was informed on the day of the dishonour that it had not been paid, and although this information was derived from a party who was not the holder of the bill, or a party to it, it is immaterial, the fact of his having the knowledge conveyed to him was all that was required, since it is not now necessary that he should be informed in express terms that he is looked to for payment, and if there was any question as to the authority of Pritchard to give such notice of dishonour, that was a question for the jury, which they have decided by their verdict. The evidence is co-extensive with the allegation in the declaration, that the acceptor did not pay the bill, although the same was duly presented to him for payment on the day when it became due, "of which the defendant then had notice," and it cannot, according to the ordinary rules of evidence, be necessary to prove more than is alleged in the declaration. The evidence clearly shows that the defendant had notice of the dishonour, and he must have known that he was looked to for payment: *Furze v. Sharwood* (1), *Solarte v. Palmer* (2), *Lewis v. Gompertz* (3).

Corrie, in support of the rule :

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It is a fallacy to call this a notice ; it was merely a loose conversation, and that too with a party who had no authority whatever to give notice. The cases cited, therefore, are not in point, and the principles illustrated by them are not applicable to the present case. The defendant had no intimation from any one whatsoever that he was looked to for payment, which is an ingredient which must, in some shape or other, exist in every such notice, if afterwards to be made the foundation of an action. Nor can it be said that this was a question of fact for the jury, for it is contended for the defendant that there was in fact no notice, or in other words,

(1) 2 Q. B. 388.

8 Bligh, N. S. 874).

(2) 37 R. R. 34 (2 Cl. & Fin. 93 ;

(3) 6 M. & W. 399.

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that putting all that was said together, it did not amount to a notice, which is wholly a question of law for the Court.

Cur. adv. vult.

May 7.

COLERIDGE, J.:

I am of opinion that this rule should be made absolute, there being no sufficient evidence of the notice of dishonour. It is now well established that when notice of dishonour is given, not by the holder of the bill, there should be such an intimation conveyed as my brother PARKE speaks of in *Lewis v. Gompertz* (1), that “the three facts required to be conveyed in every notice of dishonour must be conveyed to the mind of the person to whom it is addressed, in a written or verbal notice, either expressly or so connected with each other as to leave no reasonable doubt upon his mind as to their meaning, namely, first, that the bill was presented when due; secondly, that it was dishonoured; and, thirdly, that the party addressed is to be held liable for the payment of it.” It was upon the last of these three matters that the question turns, and

[*26] *Mr. Martin contended strongly upon the authority of *Lewis v. Gompertz*, that the notice was sufficient, for in that case it was held that the notice was good, although it did not in express terms inform the party that he was looked to for payment: and he further grounded his argument upon the form of the declaration in these cases, which merely alleges that the bill was presented for payment when it became due and was not paid, of which the defendant had notice, and that the proof need not go beyond the allegation in the declaration, which says nothing of the party being required to pay the amount; but I confess I thought there was not much force in this argument, for the allegation of notice includes all the facts necessary to constitute a good notice. As to the observations of Lord DENMAN, in *Furze v. Sharwood*, he is there speaking of the proper effect to be given to a notice of dishonour, and, he says, “To what purpose is such an intimation but to give the party notice that he is looked to for payment.” But these are merely observations, and must be taken as they were thrown out. Now we can very well understand that an intimation may be given by a party without its being suggested that he is looked to for payment. In the present case the notice was merely verbal, and there is certainly a distinction between such a notice and a written one, as very much more importance would be attributable to such a notice

than to merely a verbal one, as a great deal would depend upon the manner in which the latter kind of notice may have been given. In the present case the notice was verbal only ; and it appears that the bill having been dishonoured, the holder called upon the drawer, and there saw Pritchard, who was the foreman of Day, and told him what had occurred. Pritchard then gave his evidence, and stated that East called on Saturday about the bill, *and that afterwards, on the same day, Smith called, and was told by Pritchard that it had not been taken up, and nothing more. But there is no evidence whatever that Pritchard had any authority to give this notice, and although it is stated that he was Day's foreman, it is not even shown what the particular business of Day was, and I cannot say from the evidence that it must be taken that Pritchard had any authority to give this notice. Then Day is called as a witness, and he says that East called on the Saturday, and told him that the bill had been dishonoured, and that on the Sunday Smith called, and Day told him it was not taken up. Under all these circumstances it is perfectly ambiguous whether Pritchard had any authority to give the notice of dishonour, and I think I cannot draw any inference that he had. I think, therefore, there was no sufficient proof of notice of dishonour, and that the rule should be absolute for a new trial.

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Rule absolute.

EASTMAN v. TYLER.

(2 Bail Court Reports, 136—140.)

1847.

June 11.

Bail Court

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A particular of set-off for 20*l.* 12*s.* 6*d.*, was in the following form : "To fitting up a shop in A. Street, with one pair of glass doors, fanlight, lock, bolts, and hinges, to a partition to ditto, and moulding, all complete, and fitting up shop window with glass case and linings, and sundry work, nails," &c. On the hearing of a reference of the cause before a legal arbitrator, the value of all the specified work named in the particular was proved to be worth 9*l.*, but under the words in the particular, "sundry work, nails," &c., the arbitrator (subject to the opinion of this Court), admitted evidence of other work done about the premises, to the amount of 10*l.* 1*s.* :

Held, that the evidence was rightly received by the arbitrator, and if the plaintiff was misled or taken by surprise by the particular, he should have asked for an adjournment of the reference, to have enabled him to answer the evidence as to that claim.

THIS was a rule obtained by *M. Chambers* on the 24th of May last, calling on the defendant to show cause why a verdict should not be entered for the plaintiff in this cause, pursuant to the

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certificate of the arbitrator given herein. In this cause, it appeared that the defendant pleaded a set-off, and in pursuance of an order of Mr. Justice ERLE, made on the 8th day of March, 1847, the following particulars of set-off were delivered.

“The following are the particulars of the defendant’s set-off in this action, delivered in pursuance of the order of the Honourable Mr. Justice ERLE, dated the 8th day of March, 1847.

“1846, March.

£ s. d.

“To fitting up a shop in Anderson Street, with one pair glass doors, and fanlight and bolts and hinges to a partition to ditto, and mouldings all complete, and fitting up shop window with glass case and linings, and sundry work, nails, &c. 20 12 6

“To one quarter’s rent of house, No. 9, Anderson Street, from Lady Day, 1846, to Midsummer, 1846 12 10 0

“Dated this 11th day of March, 1847.

“Yours, &c., NATION AND NEALE,

“Orchard Street, Portman Square,

‘To Mr. JOSEPH KING, the

“Defendant’s Attorney.

Plaintiff’s Attorney or Agent.”

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The cause was referred to a legal arbitrator by an order of reference made on the 28th of April, who proceeded with the reference, and examined witnesses on both sides, after which he gave the following certificate.

“Having heard, examined, and considered the allegations and proofs of both the said parties, humbly states the following question for the opinion of this honourable Court. The defendant’s particulars of set-off delivered under an order of Mr. Justice ERLE, dated the 8th March, 1847, are as follows, viz. :

“March, 1846.

£ s. d.

“To fitting up a shop in Anderson Street, with one pair of glass doors and fanlight, lock and bolt and hinges to a partition to ditto, and moulding all complete, and fitting up shop window with glass case and linings, and sundry work, nails, &c. 20 12 6

“The amount due to the defendant for the work so particularized, that is to say, ‘for the fitting up a shop in Anderson Street, with one pair of glass doors and fanlight, lock and bolts and hinges, to a partition to ditto, and mouldings all complete, and fitting up shop window with glass case and linings,’ is nine pounds. The amount

of other work done about the premises, and included under the term 'sundry work,' is ten pounds and one shilling, making together nineteen pounds and one shilling. The plaintiff objected to any evidence being given under these particulars of set-off of more than the work specified, constituting the nine pounds, and I received the evidence of the residue subject to that objection. *If the Court shall be of opinion that the evidence of the set-off under the words 'sundry work' to the amount of ten pounds and one shilling, ought not to have been received, then I certify that a verdict for the plaintiff should be entered for eight pounds and fifteen shillings debt, and one shilling damages, but if the Court should be of opinion that such evidence was properly received, then I certify that a verdict should be entered for the defendant. And I further certify that in either case the costs of the reference and certificate are to be paid by the said parties in equal moieties. As witness my hand this third day of May, one thousand eight hundred and forty-seven.

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“ — Arbitrator.”

The present rule having been obtained,

Miller now showed cause :

The point stated by the arbitrator for the opinion of the Court in this case is a very short one, and is simply whether the defendant is entitled under the words “and sundry work, nails, &c.,” to give evidence of work done about the premises, and not more particularly specified : it is submitted that the particulars are quite large enough to authorize the arbitrator in admitting the evidence, and so the verdict must be entered for the defendant ; if the plaintiff thought that the particulars were too general, he should have applied for further and better particulars ; it is clear that the work was done, and therefore must have been all within the plaintiff's notice. There is no case to be cited in which evidence has been shut out because particulars are too vague, but the cases are all as to variance ; if they are intelligible to a reasonable extent, and not *calculated to mislead, it is always sufficient. If the party is misled, he must show satisfactorily how he was misled, and if he had been so in this case he might have had an adjournment to enable him to meet the evidence. It is to be remarked here that the plaintiff does not venture to say that the work was not done ; at all events this was a case entirely for the arbitrator to decide, and he has admitted the evidence ; in all points of view, therefore, this rule must be discharged and a verdict entered for the defendant.

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M. Chambers (Lush with him), in support of the rule :

The particulars of set-off delivered in this case are clearly not sufficient to enable the arbitrator to admit the evidence which was given before him. The rule is laid down in Archbold's Practice, vol. 2, page 1261, where he speaks of the effect of particulars of demand on the proceedings and evidence in a cause, and the strictness required therein: "The object however of this strictness is, that the opposite party may know what will be attempted to be proved against him at the trial, and prepare his evidence accordingly;" and he goes on to say, that a mistake "as to dates or other matters not calculated to mislead will not be deemed material." But in the case now before the Court, the particular was calculated to mislead, for the larger part of the claim of 20*l.* 12*s.* 6*d.* is put in as an accessory merely to the particular under the words "sundry work, nails, &c., &c.;" for the arbitrator says, by his certificate, that if he excludes the extra work, only 9*l.* was due under that item of the particular. Here the defendant misleads the plaintiff by beginning *with enumerating specific things, and then comprehending larger things in the generality. This the Court will not uphold, as it would lead to the greatest irregularity in these matters, and create great mischief.

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WIGHTMAN, J. :

If I were satisfied that injustice would be done by the defendant's succeeding in this case, I should pause before I discharged the present rule, but I think that there is no hardship at all to the plaintiff by the evidence being admitted by the arbitrator under the particular as it stands. If the plaintiff was not quite satisfied with it, he should have taken out a summons for further and better particulars. He knew something more was intended than the 9*l.*; he must have known that he owed the defendant as much money as the defendant owed him, yet he goes on with the action, and lies by, thinking he could take advantage of what he thought was a defect in the particular; if he had been misled at all, he might have asked for an adjournment, which would have been granted as a matter of course by the arbitrator; as it is, I think the evidence was rightly admitted, and that the verdict ought to be entered for the defendant; the present rule will, therefore, be discharged.

Rule discharged.



ACTION, CAUSE OF—1. Obstruction of way—Injury to reversion—Action on the case—Pleading—Arrest of judgment. *Kidgill v. Moor* 364

— 2. Disturbance of ferry. *See Ferry.*

ADVANCEMENT—Marriage settlement—Construction of proviso—Deduction of advances—Portion—After-acquired property not actually reduced into possession of husband. *Douglas v. Willes* . . . 124

ARBITRATION—1. Award—Enforcement—Attachment—Award that plaintiff should “on or before the 23rd of March next” execute a deed to be prepared by defendant—Deed not tendered for execution on or before day named—Attachment not granted for refusal to execute deed after March 23rd. *Doe d. Williams v. Howell* . . . 675

— 2. — Validity—Finding on several counts—No specific finding on each issue—Delegation of authority by arbitrator—Award not ordering payment of sum awarded. *Baker v. Cotterill* . . . 956

— 3. — Improper admission of evidence—Work done—Claim for specific work and for “sundry work, nails, &c.”—Admission of evidence as to other work done on premises. *Eastman v. Tyler* . . . 971

— 4. — Award of compensation under Lands Clauses Consolidation Act. *See Lands Clauses Acts.*

ASSIGNMENT—Of leaseholds. *See Specific Performance, 1.*

BANKER—1. Refusal to honour customer's drafts—Money placed to credit improperly obtained by customer—Right of customer to recover from banker as money had and received. *Tassell v. Cooper* . . . 411

— 2. Company—Action against shareholder—Partner. *See Company, 9.*

BANKRUPTCY—1. Deed of arrangement—Power of revocation—Conveyance of equity of redemption of estate—Communication to creditors—As to grantor's power of revocation, *quære*. *Griffith v. Ricketts* . . . 111

— 2. Property of bankrupt—Money handed to bankrupt before bankruptcy to meet accommodation bill. *See Bill of Exchange and Promissory Note, 1.*

— 3. Wrongful execution—Trespass—Judgment—Consent order, effect of not filing—Trader defendant—Order not avoided as against trader himself, but only as against subsequent assignees. *Bryan v. Child* . . . 710

BILL OF EXCHANGE AND PROMISSORY NOTE—1. Accommodation bill—Payment—Money handed to acceptor by drawer to meet bill—Implied contract—Bankruptcy—Revocation of authority—Money had and received. *Yates v. Hoppe* . . . 429

BILL OF EXCHANGE AND PROMISSORY NOTE—2. Consideration—Action by indorsee against acceptor—Indorsement without consideration—Discharge—Payment to drawer—Pleading. *Milnes v. Dawson* 939

— 3. — Promissory note — Plea that note given for money advanced to make out of funds of friendly loan society—Payee suing as officer of society. *Lomas v. Bradshaw* 476

— 4. Discharge—Satisfaction of bill as between drawer or indorser and indorsee does not necessarily enure as satisfaction on behalf of acceptor, or discharge him from liability to indorsee. *Jones v. Broadhurst* 336

— 5. — Action by indorsee against executrix of drawer—Agreement between indorsee and acceptor—Promise to suspend proceedings against acceptor — Consideration — Pleading— Discharge of drawer. *Moss v. Hall* 556

— 6. Form—"Credit in cash" held equivalent to order to pay. *Ellison v. Collingridge* 444

— 7. Indorsement—Evidence to prove indorsement before maturity. *Lysaght v. Bryant* 276

— 8. Notice of dishonour—Sufficiency of notice—Informal notice given to indorser by person not party to bill and without any apparent authority held not sufficient. *Eust v. Smith* 968

— 9. — By whom given—Notice given by indorser entitled to give notice enures for benefit of subsequent holder. *Lysaght v. Bryant* . 276

— 10. Cheque—Bonâ fide holder for value—Company—Cheque signed by directors and secretary, but not purporting to be drawn on behalf of Company. *Serrell v. Derbyshire, &c. Rail. Co.* 532

— 11. Promissory note—Form—Assurance Company—Order to cashier, "Thirty days after date credit Mrs. A. or order"—Form not according to deed of settlement of Company. *Allen v. Sea, Fire and Life Assurance Co.* 447

CHARITY AND CHARITABLE TRUST—1. Church—Trust—Chapel in England for use of congregation in strict connexion with Established Church of Scotland—Disqualification of minister—Distinction between trust created for use of Nonconformists generally and for use of an existing congregation belonging to particular minister. *Att.-Gen. v. Murdoch* 172

— 2. School—Grammar school—Removal of schoolmaster—Discretion of trustees—Appointment of trustees by Lord Chancellor, validity of—Costs of petition. *Doe d. Childe v. Willis* 916

— 3. — Ecclesiastical foundation—Removal of head master—Officer of cathedral church—Statutes—Trustee and cestui que trust—Jurisdiction of Court of Chancery to try right of schoolmaster to his office. *Whiston v. Dean of Rochester* 243

CHEQUE. See Bill of Exchange and Promissory Note, 10.

COMPANY—1. Formation—Expenses of obtaining special Act—Recovery from Company in action of debt—Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 65. *Hitchins v. Kilkenny Rail. Co.* . 425

— 2. Cheque, liability of Company on—Cheque signed by directors and secretary but not purporting to be drawn on behalf of Company. *Serrell v. Derbyshire, &c. Rail. Co.* 532

— 3. Contract—Member of provisional committee—Liability for work done—Evidence—Resolutions passed at meetings at which defendant present. *Rennie v. Clarke* 673

COMPANY—4. Shareholder—Application for shares—Abandonment of undertaking—Return of deposit—Failure of consideration—Liability of member of committee—Evidence of liability—Minute book—Entry of resolution proposed by defendant at meeting of committee of management—Ruling of Judge at N. P. *Ashpitel v. Sercombe* . . . 610

— 5. — Shares—Action for calls—Infant—Ratification—Pleading. *North Western Rail. Co. v. M'Michael* . . . 599

— 6. Shares—Action for calls—Notice of call—Evidence—List in handwriting of deceased clerk. *Eastern Union Rail. Co. v. Symonds* . 650

— 7. Shareholder, execution against, at suit of creditor of Company—Scire facias—Property in Ireland—Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), s. 36. *Devereux v. Kilkenny and Great Southern and Western Rail. Co., In re Emery* . . . 890

— 8. — Judgment against public officer—Liability of husband of married shareholder registered in her maiden name. *Dodgson v. Bell* . . . 945

— 9. Banking Company—Action against shareholder—Partner—Obligation to sue in name of public officer. *Chapman v. Milvain* . 564

— 10. Unincorporated Company—Statute authorising Company to sue and be sued in name of chairman—Chairman an agent for members of Company. *Bank of Australasia v. Harding* . . . 491

CONDITION PRECEDENT. See Contract, 2; Landlord and Tenant, 3; Railway Company, 1; Vendor and Purchaser, 1.

CONFLICT OF LAWS—1. Contract—Lex loci—Company—English shareholders—Company formed for purpose of carrying on business outside England—English shareholders bound in respect of transactions of Company by law of country in which business carried on. *Bank of Australasia v. Harding* . . . 491

— 2. Foreign judgment—Judgment of Colonial Court—Estoppel—Action brought in England for same cause—Foreign judgment not conclusive. *Bank of Australasia v. Harding* . . . 491

CONSTABLE—City of London—Authority of constable to take into custody without warrant on suspicion of misdemeanor. *Bowditch v. Balchin* . . . 716

CONTRACT—1. Breach of promise of marriage—Consideration—Pleading—Plaintiff's remaining unmarried a sufficient consideration—*Quere* whether promise by married man to marry another woman after his wife's death is void. *Millward v. Littlewood* . . . 871

— 2. Building agreement—Payment for work done—Surveyor's certificate—Condition precedent—Fraud—Evidence of collusion. *Milner v. Field* . . . 885

— 3. Specific performance—Contract to pay annuity—Construction—Consideration—Forbearance to sue on promissory notes—Security for performance of contract—Equitable jurisdiction. *Beech v. Ford* 69

— 4. Infant—Contract not for infant's benefit. See Infant.

— 5. Passenger—Ship—Warranty—Return of deposit. See Ship and Shipping, 3.

— 6. Railway Company—Works—Contractor—Non-performance of contract—Waiver—Injunction. See Railway Company, 2.

CONTRIBUTION—Joint-tenants—Action for rent against one—Right of defendant to contribution from other joint-tenants. *Boulter v. Peplow* . . . 401

CONVERSION—1. Creditor's deed—Conveyance of equity of redemption of real estate for sale for benefit of creditors—Whether operating as a conversion into personality. *Griffith v. Ricketts* . . . 111

— 2. Will—Gift of copyholds, leaseholds, merchandise and money to children and grandchildren in twenty equal shares—Direction to "get together and divide and to invest infants' shares in Government funds"—Implied direction for sale and conversion. *Mower v. Orr* . . . 191

— 3. Conversion not implied from mere direction to divide. *Cornick v. Pearce* . . . 194

COPYHOLD—1. Lord of manor—Right to minerals—Stone—Practice of tenants to remove stone immediately lying under surface—Yearly tenant under copyholder—Injunction—Remarks of the Vice-Chancellor on equitable and legal remedies. *Cuddon v. Morley* . . . 65

— 2. Manor—Inclosure of waste—Encroachment—Acts intended to indicate resumption of possession by lord—Statute of Limitations. See Limitations (Statute of), 2.

CORPORATION (MUNICIPAL)—Bond for money lent to corporation—Validity—Money borrowed after for purpose of paying debts contracted before the passing of 5 & 6 Will. IV. c. 76 (rep.). *Pallister v. Mayor of Gravesend* . . . 522

COSTS—1. Costs, where two estates, those of the testator and the executor, are administered in the same suit. *Culsha v. Cheese* . . . 88

— 2. Costs of unnecessary litigation—Claim of lien on deeds—Refusal of defendant to deliver deeds on offer to pay amount found due by Master—Disallowance of costs—Motion on further directions, regularity of. *Sentance v. Porter* . . . 158

— 3. Of arbitration under Lands Clauses Consolidation Act, 1845. See Lands Clauses Acts, 1.

And see Solicitor, 1.

COUNTY COURT—1. Jurisdiction—Splitting demand—Plaintiff having two separate claims against defendant—Reduction of claim—Particulars—Jurisdiction of Judge—Prohibition. *Kimpton v. Willey* 515

— 2. — "Carrying on business" in district—Clerk in Admiralty—Daily attendance at office within City of London—Cause of action arising within district—Bill of exchange drawn, accepted and indorsed within City of London—Delivery to indorsee in county of Middlesex—City of London Court. *Buckley v. Hann* . . . 553

— 3. — Clerk to Privy Council is not a person who "carries on his business" at the office of the Privy Council. *Sangster v. Kay* 719

COVENANT—1. Covenant to do an act which afterwards becomes impossible or useless—Release of covenantor. *Jones v. How* . . . 104

— 2. Construction—Assignment of patent—Royalty—Absolute or alternative covenant—"Or" not construed "and." *Tielens v. Hooper* 886

— 3. Breach of covenant to deduce good title—Measure of damages. *Hanslip v. Padwick* . . . 784

— 4. Lease—Condition precedent. See Landlord and Tenant, 3.

DAMAGES—Measure of—Method of estimating damages on breach of covenant to deduce good title. *Hanslip v. Padwick* . . . 784

DEED—Mistake—Family arrangement—Rectification of deed containing provisions inconsistent with actual rights of party. *Ashhurst* 214

DEFAMATION—Libel—Fair (but not verbatim) report of judicial proceedings—Malice—Pleading—Plea of not guilty—General issue. *Hoare v. Silverlock* 260

DISCOVERY—Objection to disclosure—Confidential communication—Solicitor and client—Privilege—Title to property—Solicitor afterwards becoming personally interested as devisee—Subsequent consent of client to disclosure. *Chant v. Brown* 33

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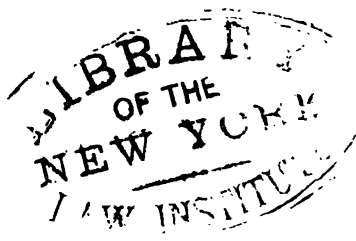
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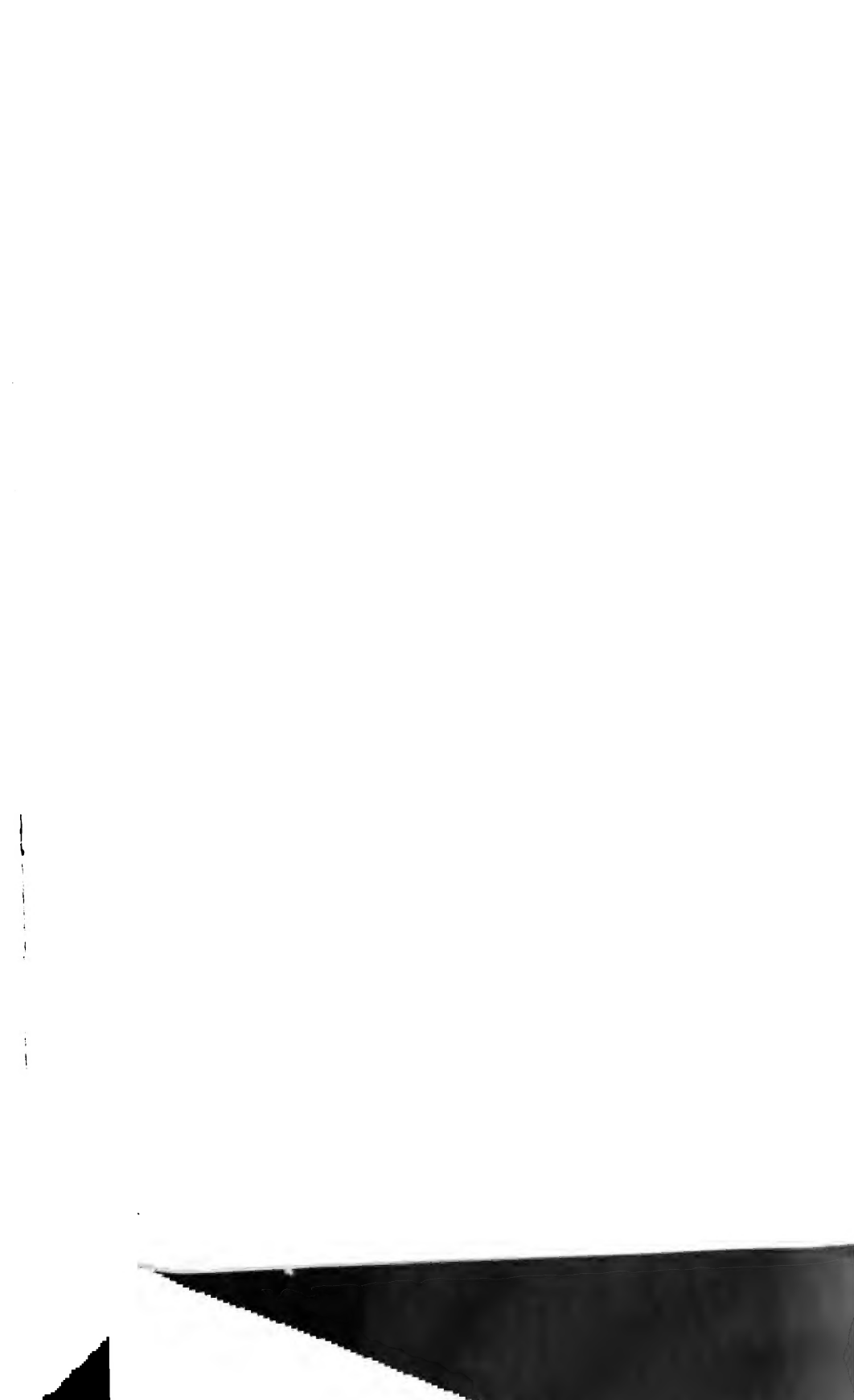
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